SUP

THE NATIONAL BANK OF

PETITION FOR CERTIORARI FILED
CERTIORARI AND BRIEF

(16,696)

(16,695.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 182.

GEORGE L. WHITMAN, PETITIONER,

vs.

THE NATIONAL BANK OF OXFORD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

GEORGE L. WHITMAN, Plaintiff in Error,
vs.
NATIONAL BANK OF OXFORD, Defendant in Error.

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The National Bank of Oxford, plaintiff, and George L. Whitman, defendant, a manifest error hath happened, to the great damage of the said George L. Whitman, defendant, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the second day of January, 1897, that the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of December, in the year of our Lord one thousand eight hundred and ninety-
2 six, and of the Independence of the United States the one hundred and twenty-first.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United
[L. S.] *States of America for the Southern District*
of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to ninety-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of George L. Whitman, plaintiff in error, against National Bank of Oxford, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 30th day of December, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twenty-first.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) Diary. The U. S. circuit court of appeals for the second circuit. George L. Whitman, plaintiff in error, *vs.* National Bank of Oxford, defendant in error. Writ of error. Wilson & Wallis, attorneys for plaintiff in error, 48 Wall St., N. Y. city.

3 Due service of a copy of the within writ of error is hereby admitted this 8th day of December, 1896. Hornblower, Byrne & Taylor, attorneys for defendant in error.

United States Circuit Court, Southern District of New York.

THE NATIONAL BANK OF OXFORD }
against }
GEORGE L. WHITMAN. }

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 29th day of May, in the year one thousand eight hundred and ninety-five.

[L. S.] JOHN A. SHIELDS, *Clerk.*
HORNBLOWER, BYRNE & TAYLOR,
Plaintiff's Attorneys.

Office and post-office address, 45 William street, New York city.

4 Supreme Court, County of New York.

THE NATIONAL BANK OF OXFORD
against
GEORGE L. WHITMAN.

CITY AND COUNTY OF NEW YORK, *ss:*

Benjamin Haywood Adams, being duly sworn, says: That he is in the office of Hornblower, Byrne & Taylor, plaintiff's attorneys herein; that on the 29th day of May, 1895, he served on George L. Whitman, the defendant above named, at his place of business, No. 40 Leonard street, New York city, the within summons, by delivering a copy thereof to him personally, and leaving the same with him. Deponent further says that he knows the person so served to be the person mentioned and described in the summons as defendant therein.

B. H. ADAMS.

Sworn to before me this 31st day of May, 1895.

LEWIS B. WOODRUFF,
Notary Public (83), *N. Y. Co.*

5 U. S. Circuit Court, Southern District of New York.

THE NATIONAL BANK OF OXFORD, Plaintiff,
against
GEORGE L. WHITMAN, Defendant.

Please take notice that the defendant appears in this action, and that we are retained as attorneys for him therein, and demand that a copy of the complaint and all papers in this action be served on us at our office, No. 48 Wall street, New York city.

Dated New York, June 14, 1895.

Yours, &c.,
WILSON & WALLIS,
Attorneys for Defendant.

Office and post-office address, No. 48 Wall street New York city.

To John A. Shields, Esq., clerk of the U. S. circuit court, so. dist. of N. Y.

(Endorsed:) U. S. circuit court, southern district of N. Y. The National Bank of Oxford, plaintiff, against George L. Whitman, defendant. Notice of appearance. Wilson & Wallis, attorneys for defendant, No. 48 Wall street, New York city. U. S. circuit court. Filed Jun- 15, 1895. John A. Shields, clerk.

6 Circuit Court of the United States for the Southern District of New York.

THE NATIONAL BANK OF OXFORD, Plaintiff,
against
GEORGE L. WHITMAN, Defendant.

The plaintiff complaining of the defendant, by Hornblower, Byrne & Taylor, its attorneys, alleges on information and belief:

I. The plaintiff is and was at the time of the commencement of this action a national banking association duly established under the laws of the United States and a corporation duly organized, created by and existing thereunder, and located and doing business at Oxford, in the State of Pennsylvania, and is and was at the time of the commencement of this action a citizen of that State. The defendant is and was at the time of the commencement of this action a citizen of the State of New York, and resided at the time of the commencement of this action and still resides in the southern district of New York. The matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.

II. In the year 1886 a corporation was duly formed, pursuant to the general laws of the State of Kansas, under the name of the Arkansas City bank. Its only place of business was in the
7 city of Arkansas City, in the county of Cowley, and State of Kansas. Its purpose was a general banking and real-estate business and it was not a religious, charitable or railway corporation. In the year 1889, the name of the corporation was duly changed to that of the Arkansas City Investment Company. Thereafter and also after the creation of the obligations of the Arkansas City Investment Company in regard to the two notes hereinafter mentioned, the corporation was duly dissolved by judgment of dissolution rendered by a court of competent jurisdiction, and completely suspended its business, and has ever since failed to resume its usual and ordinary or any business. This dissolution and suspension occurred more than twelve months prior to the institution of the action on the obligations hereinafter mentioned and more than twelve months prior to the commencement of this action. The defendant owned from the formation of the corporation and at all times thereafter, stock therein in the amount of over $50,000, and was entitled to all the privileges and subject to all the liabilities of a stockholder.

III. At all the times hereinbefore or hereinafter mentioned and at the present time, the constitution and statutes of the State of Kansas provided and still provide as follows:

Constitution, article XII, section 2: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder."

General Statutes, 1868, chapter 23, sec. 32:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable

corporation, and there cannot be found any property whereon
8 to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Section 40, as amended by Laws of 1883, chap. 46, section 1:

"A corporation is dissolved: first, by the expiration of the time limited in its charter, second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

Section 44:

"If any corporation created under this or any general statute of this State, except railway, or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution
9 for the recovery of the portion of such debt for which they were liable and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

IV. On the 16th day of April, 1895, in the district court of the thirteenth judicial district of the State of Kansas, sitting in and for the county of Cowley, that court being a court of general jurisdiction and having jurisdiction of the subject-matter of the action immediately hereinafter mentioned and of the persons of the parties thereto, the plaintiff herein recovered against The Arkansas City Investment Company, the defendant in an action then pending in that court in which the plaintiff herein was the plaintiff, judgment upon two obligations of the Arkansas City Investment Company for the amount of three thousand four hundred and forty-nine dollars,

with interest thereon at the rate of ten per cent. per annum from that date, together with the costs of that action, then and there taxed at nineteen dollars and thirty cents, the total amount of said judgment being three thousand four hundred and sixty-eight dollars and thirty cents, with interest at ten per cent. from the date thereof.

The obligations, dues or debts unpaid on which the above judgment was recovered were as follows: 1. On or about the 4th day of August, 1890, one J. D. Harkleroad and one E. C. Harkleroad, for value received, duly made, executed and delivered to the Arkansas City Investment Company, J. L. Huey being the cashier and
10 managing officer thereof, their certain promissory note in writing in the words and figures following, to wit:

"ARKANSAS CITY, KANSAS, *Aug. 4th*, 1890.

Six months after date, for value received, I promise to pay to the order of J. L. Huey, cash'r, at the office of the Arkansas City Investment Company, twenty hundred and fifty dollars, with interest at the rate of ten per cent. per annum, payable annually from maturity until paid.

The sureties, guarantors and endorsers of this note severally agree to and do hereby waive demand or presentation of this note for payment to the makers hereof and waive protest and notice of non-payment, and do hereby grant to any holder of this note the right to grant extensions without notifying them, or either of them, hereby ratifying such extensions and remaining bound on this note as if no extension has been granted.

(Signed) J. D. HARKLEROAD.
(Signed) E. C. HARKLEROAD."

No. 19356.

$2,050.00

Due Feb. 4–7, '91.

Notice.

Afterward, and before the maturity of the note, same was duly endorsed and transferred for value to this plaintiff, who is now the lawful holder and owner thereof. At the last-mentioned time the Arkansas City Investment Company, for a good and valuable consideration, entered into and endorsed on the note a contract of guaranty in writing in the words and figures following, to wit:

"For value received, I hereby guarantee the payment of the within note and of any renewals of the same, and hereby waive pro-
11 test, demand and notice of demand and non-payment and suit against the maker, and consent that the payment of this note may be extended from time to time without affecting my liability thereon.

ARKANSAS CITY INVESTMENT COMPANY, *Arkansas City, Kansas.*
J. L. HUEY, *Cashier.*"

Plaintiff took the note for value and relying upon the endorsement and guaranty. No part of the note, either principal or interest, has been paid by the maker of said note, or by any other person, save and except the following partial payments made thereon, to wit:

11 February,	1892	$700 00
2 December,	"	425 00
10 "	"	175 00
31 May,	1893	100 00
31 March,	1894	200 00
31 March	"	155 67

No other payments have been made on said note although demand thereof has been duly made of the maker and of the endorser. On the 13th day of April, 1895, there was still due and owing on the note from the Arkansas City Investment Company to this plaintiff, with proper interest computations, the sum of $847.66.

2. On or about the 1st day of September, 1890, one Silas Kennedy, for value received, duly made, executed and delivered to the Arkansas City Investment Company, J. L. Huey being the cashier and managing officer thereof, his certain promissory note in writing in the words and figures following, to wit:

12 "ARKANSAS CITY, KANSAS, *Sept. 1st*, 1890.

"Six months after date, for value received, I promise to pay to the order of J. L. Huey, cash'r, at the office of the Arkansas City Investment Company, twenty-eight hundred and twenty-five dollars, with interest at the rate of ten per cent. per annum, payable annually, from maturity until paid.

"The sureties, guarantors and endorsors on this note severally agree to, and do hereby waive demand or presentation of this note for payment to the makers hereof, and waive protest and notice of non-payment, and do hereby grant to any holder of this note the right to grant extensions without notifying them, or either of them, hereby ratifying such extensions and remaining bound on this note as if no extension has been obtained.

(Signed) SILAS KENNEDY."

No. 19403.

$2,825.00

Due M'ch 1–4, '91.

Notice.

Afterward, and before the maturity of the note, the same was duly endorsed and transferred for value to this plaintiff, who is now the lawful holder and owner thereof. At the last-mentioned time the Arkansas City Investment Company, for a good and valuable consideration, entered into and endorsed on the note a contract of guaranty in writing in the words and figures following, to wit:

"For value received, I hereby guarantee the payment of the within note, and any renewal of the same, and hereby waive protest, demand and notice of demand and non-payment and suit against

the maker, and consent that the payment of this note may be extended from time to time, without affecting my liability thereon.

ARKANSAS CITY INVESTMENT CO.,
Arkansas City, Kansas.
J. L. HUEY, *Cashier.*"

13 Plaintiff took the note for value and relying upon the endorsement and guaranty. No part of the note, either principal or interest, has been paid by the maker of said note, or by any other person, save and except the following partial payments made thereon, to wit:

March 25, 1891	$400 00
Nov. 25, 1892	747 19

No other payments have been made on said note, although demand thereof has been duly made of the maker and of the endorser. On the 13th day of April, 1895, there was still due and owing on the note from the Arkansas City Investment Company to this plaintiff, with proper interest computations, the sum of $2,601.71.

V. Thereafter, and on or about the 30th day of April, 1895, an execution was duly issued out of the district court upon the judgment against the property and effects of the Arkansas City Investment Company. There could not be found by the sheriff of the county of Cowley, in the State of Kansas, to whom the execution was directed, any property of the corporation whereon to levy such execution, nor could there be found by the sheriff, or otherwise, with reasonable diligence, or by any means known to the plaintiff, any property or effects of said corporation whereon to levy such execution; such execution was duly returned by said sheriff wholly unsatisfied, and before returning said execution the sheriff of said county entirely exhausted the assets and property of said corporation, and the judgment cannot now be collected by the plaintiff out of any assets of the corporation. The corporation is wholly insolvent and has no assets of any kind, nature or description from which can be met the money due the plaintiff upon the various demands hereinbefore set forth and the judgment recovered
14 thereon. The defendant has not met any part of his liability as a stockholder under the statutes hereinbefore mentioned.

VI. No part of the judgment or of the claims on which it was recovered, except as hereinbefore mentioned, has been paid by the Arkansas City Investment Company or by the defendant or by any other person, although due demand has been made therefor, and there is now due and owing to the plaintiff from this defendant the sum of three thousand four hundred and sixty-eight dollars and thirty cents ($3,468.30) with interest thereon from April 16, 1895, at the rate of ten per cent.

Wherefore, the plaintiff demands judgment against the defendant for the sum of three thousand four hundred and sixty-eight dollars and thirty cents ($3,468.30), with interest thereon at ten per cent. from April 16, 1895, together with the costs of this action.

HORNBLOWER, BYRNE & TAYLOR,
Plaintiff's Attorneys, 45 William Street, New York City.

CITY AND COUNTY OF NEW YORK, *ss*:

Howard A. Taylor, being duly sworn, says that he is a member of the firm of Hornblower, Byrne & Taylor, attorneys for the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the facts therein stated to be alleged upon information and belief, and that as to those facts he believes it to be true.

The reason why this complaint is not verified by the plaintiff is that the plaintiff is a foreign corporation, and not within the county where any of its attorneys reside or have their office. The grounds of deponent's belief as to all matters not stated upon his knowledge, are correspondence with the officers of the plaintiff, copies of
15 the judgment and obligations referred to in the complaint which are in deponent's possession, and correspondence with the attorneys for plaintiff in Kansas.

HOWARD A. TAYLOR.

Sworn to before me this 14th day of September, 1895.
EDWARD B. MOWBRAY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) U. S. circuit court, southern district of New York. The National Bank of Oxford, plaintiff, against George L. Whitman, defendant. Complaint. Hornblower, Byrne & Taylor, attorneys for plaintiff, 45 William street, New York. Due and timely service of a copy of the within complaint is hereby admitted. Sept. 14, 1895. Wilson & Wallis, def't's att'ys.

Circuit Court of the United States, Southern District of New York.

THE NATIONAL BANK OF OXFORD, Plaintiff,
against
GEORGE L. WHITMAN, Defendant.

The defendant above named, by Wilson & Wallis, his attorneys, answers the complaint of the above-named plaintiff herein, as follows:

I. *For a First and Separate Defense.*

1. Said defendant denies that he has any knowledge or
16 information sufficient to form a belief as to whether said plaintiff was or is a national banking association, established under the laws of the United States, or duly organized, created by or existing thereunder; or as to whether said plaintiff was or is a citizen of the State of Pennsylvania; or as to whether the matter in dispute herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars.

2. Said defendant admits that at the time of the commencement of this action he was and still is a citizen of the State of New York, and a resident of the southern district of New York.

3. Said defendant admits that heretofore, and in or about the year 1886, certain proceedings were had for the purpose of forming a corporation of the State of Kansas, under the name of the Arkansas City bank, which was not intended to be a religious, charitable or railway corporation. But said defendant denies that he has any knowledge or information sufficient to form a belief as to whether said Arkansas City bank was duly formed pursuant to the general laws of the State of Kansas, or as to whether in the year 1889, or at any time, the name of said Arkansas City bank was duly changed to that of the Arkansas City Investment Company, or as to whether said Arkansas City bank or said Arkansas City Investment Company thereafter, or at any time, was duly dissolved, or dissolved by judgment of dissolution rendered by a court of competent jurisdiction. And said defendant denies that he has any knowledge or information sufficient to form a belief as to whether said Arkansas City bank or Arkansas City Investment Company, at or within the times in the said complaint mentioned, suspended its business and failed to resume the same as therein alleged.

17 4. Said defendant admits that in or about the year 1886, he became the owner of stock, or what purported to be stock of the Arkansas City bank, in the amount of over fifty thousand dollars. But said defendant denies that he has any knowledge or information sufficient to form a belief as to whether he was entitled to all the privileges or subject to all the liabilities of a stockholder, whether by reason of such ownership or otherwise.

5. Said defendant denies that he has any knowledge or information sufficient to form a belief as to the matters and things alleged in paragraphs three, four, five and six of the said complaint; excepting that said defendant admits that he, said defendant, has not hitherto been subjected to any liability as a stockholder of said Arkansas City bank, or said Arkansas City Investment Company, and that he has not paid any part of any judgment or judgments against the same; and said defendant denies that there is now or ever has been due or owing from him to the said plaintiff the sum of three thousand four hundred and sixty-eight dollars and thirty cents, with interest, as alleged in paragraph six of said complaint, or any part of said sum, or any sum whatsoever.

6. Said defendant denies each and every other allegation in said complaint contained, not hereinbefore specifically admitted, qualified or denied.

II. *For a Second and Separate Defense.*

Said defendant alleges that, as he is advised and believes, this court has not jurisdiction of the subject of the action or of the subject of the cause of action alleged or attempted to be alleged in the said complaint.

18 III. *For a Third and Separate Defense.*

Said defendant alleges that, as he is advised and believes, the said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, said defendant demands judgment; that the said complaint be dismissed, with costs.

WILSON & WALLIS,
Defendant's Attorneys, 48 *Wall Street, New York City.*

CITY AND COUNTY OF NEW YORK, *ss*:

George L. Whitman, being duly sworn, says: That he is the defendant in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEO. L. WHITMAN.

Sworn to before me this 23d day of October, 1895.

WM. E. ZABRISKIE,
[SEAL.] *Notary Public* (1), *N. Y. Co.*

(Endorsed:) U. S. circuit court, southern dist. of N. Y. The National Bank of Oxford ag'st George L. Whitman. Answer. Wilson & Wallis, def't's att'ys, 48 Wall St., N. Y. city. U. S. circuit court, filed Oct. 3, 1895. John A. Shields, clerk.

19 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Hoyt H. Wheeler, circuit judge.

THE NATIONAL BANK OF OXFORD
vs.
GEORGE L. WHITMAN.

Now comes the plaintiff, by Howard A. Taylor, Esq., its attorney, and moves the trial of this cause.

Likewise comes the defendant, by William G. Wilson, Esq., his attorney.

Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the evidence for the plaintiff and the argument of counsel, the jury, by direction of the court, say that they find a verdict for the plaintiff for the amount demanded in the complaint, and so they say all.

Mr. Wilson moves to set aside the verdict.

A stay of forty days granted.

An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

20 United States Circuit Court, Southern District of New York.

NATIONAL BANK OF OXFORD
vs.
GEORGE C. WHITMAN. } At Law.

WHEELER, *J.:*

The constitution of Kansas provides, art. XII: "SEC. 2. Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholder," and the General Statutes of that State, 1889:

"(1192.) *Execution against Stockholders; Action.*

SECTION 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any shareholder, excepting upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

21 The defendant was an original holder of a large part of the stock of the Arkansas City Investment Co., a corporation existing under and subject to these provisions, against the property of which an execution issued on a judgment there in favor of the plaintiff and was returned unsatisfied. This action is brought upon the last clause of the statute to charge him with the amount of this judgment, which is much less than the amount of his stock. Notes which were the foundation of the judgment were proved with it, and a verdict was directed for the plaintiff, and the case has now been submitted on a motion to set aside the verdict principally because the suit is brought here outside of the State of Kansas.

Several cases of great weight and entitled to very respectful consideration have been cited to the effect that the action is wholly local. Bank of N. A. *vs.* Rindge, 154 Mass., 203; Fowler *vs.* Lamson, 146, 111, 472; Marshall *vs.* Sherman, 148 N. G., 9. But in Howell *vs.* Mangelsdorf, 33 Kan., 194, the supreme court of Kansas, after observing that two remedies were prescribed in this statute, and holding that the notice of motion required in one could not be given without the State, said as to the other, which is this one:

"This rule does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another State and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation and an action to en-

force the same is transitory and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

That the construction of the constitutions and statutes of States by their tribunals is binding is not questioned, but this declaration is said to be so far merely *obiter* as not to be authoritative. The question whether the action is transitory and could be maintained without the State was not directly in judgment; but it was
22 so before the court, in construing the provisions of the constitution and statutes together, that it appears to have received full consideration. The opinion of the court upon it is at least entitled to great weight elsewhere. The action itself is personal, no special proceedings are provided for in it, and, according to the decisions of the Supreme Court of the United States, it would appear to be transitory (Flash *vs.* Conn., 109 U. S., 371.) It is said that the jurisdiction of this court is concurrent, and so only coextensive, with that of the courts of New York; and that this court here should not take cognizance of cases that those courts would not. The declining of jurisdiction by those courts cannot, however, take from this court that which properly belongs to it; and the decision of what belongs to this, at least, must ultimately be determined by the Supreme Court of the United States. The decisions of that court must be followed here, as understood; and so by them this motion must be overruled.

Motion denied; and judgment on verdict ordered.

William B. Hornblower, for plaintiff.
William G. Wilson, for defendant.

(Endorsed:) U. S. circuit court, south. dist. N. Y. National Bank of Oxford *vs.* George C. Whitman. Opinion, Wheeler, J. U. S. circuit court. Filed Aug. 18, 1896. John A. Shields, clerk.

23 At a term of the circuit court of the United States for the second circuit, held in and for the southern district of New York, at the Federal building, in the city of New York, on the 24th day of August, 1896.

Present: Hon. Hoyt H. Wheeler, judge.

THE NATIONAL BANK OF OXFORD, Plaintiff, *vs.* GEORGE L. WHITMAN, Defendant.	Order Denying Motion to Set Aside the Verdict.

The issues in this action having come on for trial at a stated term of this court, and a jury having on the 11th day of June, 1896, under direction of the court found a verdict for the plaintiff for $3,868.05, with interest at ten per cent., and the defendant having moved upon the minutes to set the verdict aside:

Now, on the papers, pleadings and the minutes and all proceedings herein, and after hearing Mr. William G. Wilson, of counsel for defendant, in favor of the motion, and Mr. William B. Hornblower and Mr. Howard A. Taylor, of counsel for plaintiff, in opposition thereto, and due deliberation having been had thereon,

And on motion of Hornblower, Byrne & Taylor, attorneys for plaintiff, it is ordered, that the defendant's motion to set
24 aside the verdict be, and the same hereby is, denied, and that the plaintiff have judgment upon the verdict.

HOYT H. WHEELER.

(Endorsed:) United States circuit court, southern dist. of New York. The National Bank of Oxford, plaintiff, against George L. Whitman, defendant. Order denying motion to set aside the verdict. Hornblower, Byrne & Taylor, attorneys for plaintiff, 30 Broad street, New York. U. S. circuit court. Filed August 24, 1896. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

THE NATIONAL BANK OF OXFORD, Plaintiff,
vs.
GEORGE L. WHITMAN, Defendant.
} Judgment, $4,205.48. 1 December, 1896.

The summons issued out of this court having been personally served upon the defendant, George L. Whitman, within the State of New York, in the southern district of New York, and this defendant having appeared generally by Messrs. Wilson & Wallis, his attorneys, and all the issues having come on for trial at a stated term of this court, held at the Federal building in the city of New York, and a jury having been impaneled and the issues having
25 been tried before the Honorable Hoyt H. Wheeler, district judge, and trial having proceeded from day to day, and the jury having on the 11th day of June, 1896, under direction of the court found a verdict for the plaintiff for three thousand eight hundred and sixty-eight dollars and five cents ($3,868.05), with interest at ten per cent., and the defendant having moved upon the minutes to set the verdict aside and the motion to set aside the verdict having been duly considered, and thereafter, on the 24th day of August, 1896, an order having been entered denying the same and directing that the plaintiff have judgment upon the verdict, and the plaintiff's costs having been duly taxed:

Now, on the summons and complaint herein, and due proof of personal service thereof upon the defendant, and on the defendant's notice of appearance, the answer, the extract from the minutes of the clerk of this court, the order denying the motion to set aside the verdict, as aforesaid, and on all the papers and proceedings herein, and on motion of Hornblower, Byrne & Taylor, attorneys for the plaintiff, it is

Ordered and adjudged, that The National Bank of Oxford, plaintiff herein, do recover of the defendant George L. Whitman, the principal sum of three thousand eight hundred and sixty-eight dollars and five cents ($3,868.05) with interest thereon at ten per cent. from 11th June, 1896, viz: one hundred and eighty-two dollars and sixty-five cents ($182.65), and one hundred and fifty-four $\frac{78}{100}$ dollars ($154.78), its costs and disbursements as taxed; amounting in

the whole to four thousand two hundred and five $\frac{48}{100}$ dollars ($4,205.48), with interest from 1st December, 1896, the date hereof, at ten per cent.; and that the plaintiff have execution therefor.

Judgment signed this first day of December, 1896.

JOHN A. SHIELDS, *Clerk.*

26 Take notice that the within is a copy of the judgment this day entered and filed in the judgment-roll in the office of the clerk of this court.

Dated New York, 1st December, 1896.

Yours, &c.,

HORNBLOWER, BYRNE & TAYLOR,
Attorneys for Plaintiff.

Office and post-office address, 30 Broad street, New York city.

To Messrs. Wilson & Wallis, attorneys for defendant.

(Endorsed:) United States circuit court, southern district of New York. The National Bank of Oxford *v.* George L. Whitman. Judgment-roll. Hornblower, Byrne & Taylor, attorneys for plaintiff, 30 Broad street, New York city. U. S. circuit court. Filed Dec. 1, 1896, 3.14 p. m. John A. Shields, clerk.

27 United States Circuit Court, Southern District of New York.

NATIONAL BANK OF OXFORD, Plaintiff,
against
GEORGE L. WHITMAN, Defendant. } Bill of Exceptions.

Afterwards, to wit, on the tenth day of June, 1896, at a stated term of said court, held at the city of New York, before Hon. Hoyt H. Wheeler, the issues joined between the parties coming on to be tried before the said judge, and a jury having been duly sworn and empaneled, plaintiff being represented by William B. Hornblower and Howard A. Taylor, and the defendant by William G. Wilson, their respective counsel, the following proceedings were had:

JOHN E. RAMSEY, sworn and examined on behalf of the plaintiff, testified as follows:

By Mr. TAYLOR:

Q. What is your business?

A. My business is cashier of the National Bank of Oxford.

Q. Is that an institution organized under the laws of the United States?

A. Yes, sir.

Q. For banking purposes?

A. Yes, sir.

Q. Under the national banking act?

A. Yes, sir.

Q. Where is its place of business?

28 A. It is located at Oxford, Chester county, Pennsylvania.
Q. Is that its only place of business?
A. Yes, sir.

No cross examination.

Plaintiff's counsel then read from the deposition of James L. Huey, taken in this cause at Arkansas City, as follows:

J. L. HUEY, being first duly sworn upon his oath, testifies as follows:

Direct examination:

Q. State your name.
A. J. L. Huey.
Q. Where do you reside, Mr. Huey?
A. Arkansas City, Kansas.
Q. How long have you resided in Arkansas City, Kansas?
A. Twenty-three years.
Q. Are you acquainted with an institution which formerly did business in Arkansas City, Kansas, known as the Arkansas City Investment Company?
A. Yes.
Q. When did you first become acquainted with this company?
A. Well, about the 1st of June, 1889.

Plaintiff's counsel offers in evidence certified copy of the articles of incorporation of the Arkansas City bank. Received and marked "Plaintiff's Exhibit 1 of this date."

PLAINTIFF'S EXHIBIT 1.

STATE OF KANSAS, OFFICE OF THE GOVERNOR.

I, E. N. Morrill, governor of the State of Kansas, do hereby certify that W. E. Edwards is the duly elected, qualified and
29 acting secretary of state of the State of Kansas, and that the signature to the within certificate is his genuine signature and that said certificate and attestation is in due form of law and by the proper officers.

In testimony whereof I have hereunto subscribed my name and caused the great seal of the State of Kansas to be affixed.

Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

[SEAL.] E. N. MORRILL, *Governor.*

STATE OF KANSAS, OFFICE OF THE SECRETARY OF STATE.

I, W. C. Edwards, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original articles of incorporation of the Arkansas City bank, filed in my office December 1, 1886.

In testimony whereof, I have hereunto subscribed my name and

affixed my official seal. Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

W. C. EDWARDS,
[SEAL.] *Secretary of State.*
By —— ——,
Assistant Secretary of State.

Articles of Incorporation of the Arkansas City Bank.

First. The name of the corporation is the Arkansas City bank.

Second. This corporation is formed for the purpose of receiving money on deposit and of allowing interest thereon, or otherwise, of buying and selling exchange, gold, silver, coin, bullion, uncurrent money, bonds of the United States, and all other bonds and
30 securities, of loaning money on real-estate and personal security, of discounting negotiable notes and non-negotiable notes, and other written securities, and of owning, buying and selling real estate.

Third. The place where its business is to be transacted is the city of Arkansas City, in the county of Cowley and State of Kansas.

Fourth. This corporation shall exist for the term of ten years from the first day of January, 1887.

Fifth. The number of its directors shall be five, and the names and residences thereof for the first year are—

Samuel Newell, of New York city, N. Y.
George L. Whitman, of New York city, N. Y.
James L. Huey, of Arkansas City, Kansas.
Chas. Hutchins, of Arkansas City, Kansas.
Frank J. Hess, of Arkansas City, Kansas.

Sixth. The amount of its capital stock is two hundred thousand dollars, divided into two thousand shares of one hundred dollars each.

In testimony whereof, we, the undersigned, have hereunto set our hands as incorporators this second day of September, A. D. 1896.

JAMES L. HUEY.
CHAS. HUTCHINS.
FRANK J. HESS.
GEO. L. WHITMAN.
SAMUEL NEWELL.

STATE OF KANSAS, } *ss:*
Cowley County, }

Be it remembered that on this second day of September, A. D. 1886, personally came before the undersigned, a notary public within and for said county and State, James L. Huey, Chas. Hutchins and Frank J. Hess, all of whom are personally known to
31 me to be the identical persons who executed the above and foregoing articles of incorporation, the said James L. Huey, Chas. Hutchins and Frank J. Hess being personally known to me to be residents of the State of Kansas, and said persons acknowledge

that they executed the above instrument of writing for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

RICHARD U. HESS,
[SEAL.] *Notary Public.*

Commission expires July 14, 1888.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this 12th day of November, A. D. 1886, personally came before me, the undersigned, a notary public within and for the county and city of New York aforesaid, Samuel Newell and George L. Whitman, to me known to be the same persons who signed the foregoing instrument of writing as incorporators, and said persons acknowledged that they executed the same for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

CHAS. L. THATCHER,
[SEAL.] *Notary Public* (78), *N. Y. Co.*

Commission expires March 30, 1888.

(Endorsed:) Filed for record Dec. 1, 1886. E. B. Allen, sec'y of state.

Also certificate as to the amount of the capital stock and the number of shares of said bank. Received and marked "Plaintiff's Exhibit 2."

32 PLAINTIFF'S EXHIBIT 2.

STATE OF KANSAS, OFFICE OF THE GOVERNOR.

I, E. N. Morrill, governor of the State of Kansas, do hereby certify that W. C. Edwards is the duly elected, qualified and acting secretary of state of the State of Kansas, and that the signature to the within certificate is his genuine signature, and that said certificate and attestation is in due form of law and by the proper officers.

In testimony whereof, I have hereunto subscribed my name and caused the great seal of the State of Kansas to be affixed.

Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

[SEAL.] E. N. MORRILL, *Governor.*

STATE OF KANSAS,
OFFICE OF THE SECRETARY OF STATE.

I, W. C. Edwards, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original certificate relating to capital stock of the Arkansas City bank on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed my official seal.

Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

W. C. EDWARDS,
Secretary of State,

[SEAL.]

By —— ——,
Assistant Secretary of State.

33 *Certificate of the President and Secretary of the Arkansas City Bank.*

Samuel Newell, president, and James L. Huey, secretary of the Arkansas City bank, does each for himself hereby certify that the name of the corporation is the Arkansas City bank.

That the name of the location where said bank is located is Arkansas City, Cowley county, Kansas.

That the amount of the capital stock of said bank is two hundred thousand dollars; that the number of shares into which the capital stock is divided is two thousand; that the names and residences of each stockholder and the number of each stockholder's shares are as follows, namely:

George L. Whitman, New York city, New York, one thousand shares.

Samuel Newell, New York city, New York, six hundred and forty-nine shares.

James L. Huey, Arkansas City, Kansas, three hundred and forty-nine shares.

Mary L. Newell, New York city, New York, one share.

Mary E. Huey, Arkansas City, Kansas, one share.

And that said bank was organized on the fourth day of December, A. D. 1886.

In testimony whereof, we, the undersigned, have hereunto set our hands and seals this 10th day of December, A. D. 1886.

SAMUEL NEWELL, *President.*
J. L. HUEY, *Sec'y.*

STATE OF KANSAS, } ss:
Cowley County, }

Be it remembered that on the 28th day of December, A. D. 1886, personally came before the undersigned, a notary public within and for said county and State, James L. Huey, who is personally known to me to be the identical person who executed the above and
34 foregoing certificate; the said James L. Huey being personally known to me to be a resident of the State of Kansas, and said person acknowledged that he executed the above instrument of writing for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year last above written.

RICHARD U. HESS,
Notary Public.

Commission expires July 14, 1888.

STATE OF NEW YORK, } ss.:
County and City of New York, }

Be it remembered, that on this tenth day of December, A. D. 1886, personally came before the undersigned, a notary public within and for the county and city of New York aforesaid, Samuel Newell, to me known to be the same person who signed the foregoing instrument of writing, and said person acknowledged that he executed the same for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

CHARLES L. THATCHER,
Notary Public (78), *N. Y. Co.*

Commission expires March 30, 1888.

(Endorsed:) Certificate of the Arkansas City bank, Arkansas City, Kansas.

Q. Did you have any connection with the Arkansas City bank in an official way?

A. I did.

Q. What was it?

A. I was the cashier.

Q. How long did you hold that position?

A. From the organization of the bank.

35 Q. To what time?

A. All the time until after the time we changed the name, and then after we changed the name until December, 1890.

Q. Where did the Arkansas City bank do business?

A. In Arkansas City, Kansas.

Q. Where did the Arkansas City Investment Company do its business?

A. In Arkansas City, Kansas.

Q. Do you mean that they maintained their main office and place of business at Arkansas City, Kansas?

A. Yes.

Q. Have you in your possession the minute book of the Arkansas City bank, in which is recorded the minutes of the proceedings of the board of directors, and also of its stockholders?

A. No.

Q. Where is that book, if you know?

A. I don't know.

Q. Was there any such a book ever kept?

A. No; we never kept, strictly speaking, a minute book.

Q. Was any record made of the proceedings of the stockholders and directors?

A. Yes.

Q. Have you such a record?

A. No; I haven't got it.

Q. Do you know where it is at this time?

A. I don't.

Q. Since the service of process upon you for your attendance here as a witness have you made search for the record, in whatever form it may have been kept, of the proceedings of the stockholders and also of the directors of the Arkansas City bank?

A. I looked through what papers and books were turned over to me by the former assignee.

Q. Could you find any such book or record?

A. No.

36 Q. Is that the only place you had of making search from which you could probably obtain the book or record?

A. That is the only place that it could be, if it was in Arkansas City at all.

A. And you failed to find it?

A. I didn't find it; no.

Q. Were you present at the different meetings of the stockholders and directors of the Arkansas City bank when it was a running corporation?

A. Yes.

Q. Please state the date, as nearly as you can remember, when this corporation was organized?

A. The organization was organized some time in December, 1886; commenced to do business as a corporation on the 1st of January, 1887.

Q. After the incorporation of the Arkansas City bank was any stock issued, and if so, was the record made and kept of such stock so issued?

A. There was.

Q. Have you in your possession the original record of the issuance of stock in the Arkansas City bank?

A. I have.

Q. Will you please produce it?

A. (Witness produces book.)

Q. I notice upon the stub record here a memorandum. In whose handwriting is that, if you know?

A. (Looking at paper.) That's mine.

Q. When did you make that record?

A. On the 30th day of December, 1886.

Q. Was that the only record kept of the issuance of stock to the stockholders of the Arkansas City bank?

A. That, I believe, is the only record we had.

Q. Please look through the several stubs there and say, if you know, in whose handwriting the entire record is made of all the stock issued?

A. (Looking through record.) It's my own; so far as this record goes, it is.

37 Q. Was any stock ever issued to any other persons other than as shown there?

A. None that I have any knowledge of.

Q. Will you permit that original record to be introduced in evidence and attached to your deposition and made a part of it?

A. No; I don't know that I care about letting these get off. There's plenty here to make copies of them.

Q. Will you permit the notary to take that record and make a copy of each of the stubs of record of stock issued, and attach same to this your deposition, properly identifying it as "Exhibits C, D, E, F and G"?

A. Yes.

(By DEFENDANT'S COUNSEL:)

Q. Mr. Huey, these papers that you now speak of were merely memorandums made by you on separate pieces of paper for the certificates of stock of the Arkansas City bank, issued to different individuals at the time that you state?

A. Yes.

Q. Is this record the original one of all the stock issued in the Arkansas City bank?

A. That is all the record I know anything about, and is the only one, so far as I can remember, of any stock that was issued; and that is all the stock that I ever had any knowledge of being issued, as shown on those stubs.

Q. From these stubs, did you detach any paper at the time of the issuance?

A. Yes, I did.

Q. What did you detach from these stubs of record above identified?

A. The certificates of stock that were issued to the stockholders.

Q. Do you have a knowledge of the delivery of any of the certificates of stock so issued; and if so, you may mention the persons to whom the same was delivered.

38 A. The stock—three certificates were delivered to Samuel Newell, and two of the certificates were retained by me.

Q. To whom did you deliver certificate number one for one thousand shares?

A. It was delivered to Samuel Newell.

Q. Are you acquainted with the defendant George L. Whitman?

A. I am.

Q. How long have you known him?

A. I got acquainted with him, I think it was, in 1885.

Q. Where?

A. At Arkansas City, Kansas.

Q. He was then here at that time?

A. He was.

Q. Have you seen him since that time?

A. Yes, sir.

Q. Where?

A. At Arkansas City, Kansas, and New York city.

Q. When did you next see him in Arkansas City, Kansas?

A. I think it was in October, 1889.

Q. Did you ever see in his possession the original certificate of stock which you have stated was detached from the record here marked No. 1?

A. Yes, I did.

Q. Where was that?

A. In New York city.

Q. Did you have a conversation with him at that time with reference to that certificate of stock, and of his holding the same?

A. Not exactly about that particular piece of paper.

Q. Was anything said in that conversation between Mr. Whitman and yourself about the affairs of the Arkansas City bank?

A. Yes; I think there was.

Q. After the organization of this corporation, the Arkansas City bank, and after it began business, were any dividends declared and paid to the stockholders?

39 A. There were.

Q. Who made the payment of these dividends?

A. I did.

Q. To whom did you make these payments?

A. To the stockholders direct.

Q. Who were they?

A. George L. Whitman, Samuel Newell, Mary L Newell, J. L. Huey and Mary E. Huey. I want to qualify my answer a little. In relation to the payment of dividends, I didn't pay any dividends direct to Mrs. Newell nor Mrs. Huey, but they were sent to Mr. Newell, and Mrs. Huey's part was retained by myself.

Q. You now remember the amount of dividends furnished to George L. Whitman?

A. There was ten per cent. in the years 1887 and 1888, those two years, and 1889, three years; and if I am not mistaken there was a dividend paid the 1st of July, 1890, but I am not sure; I don't say for sure whether there was a dividend paid the 1st of July or not.

Q. Has there ever been any transfer made upon the books of the Arkansas City bank of certificate No. 1, of its stock for one thousand (1,000) shares, which was issued to George L. Whitman?

A. Not that I have any knowledge of.

Q. In whose possession has this record book been that you have produced since the issuance of the stock you note?

A. Until December, 1890, it was in my possession, or up to December, 1890, it was in my possession, and from that time until about the 1st of December, 1894, it was in Charles A. Scruton's possession.

Q. When did it again come into your possession?

A. About the 1st of December, 1894.

Q. And who has had its custody since then?

A. I have.

Q. Have you the minute book of the proceedings of the stockholders and officers of the Arkansas City bank, made at that time, or about then?

A. I have not.

40 Q. Was any minute book kept of such proceedings?

A. Minutes were written out on legal-cap paper, but not in the form of a book.

Q. Do you know what was done with that legal-cap paper upon which they were written?

A. Mr. Newell took them away with him when he left; that is my recollection of it, anyway.

Q. When was that?

A. That was, I think, some time in the month of May, 1889; May or June, I don't know which.

Q. Have you made diligent search among your books and papers for this record?

A. I have.

Q. Have you found it?

A. No, sir..

Q. You may now state what was done by the stockholders and officers of the Arkansas City bank with reference to the cessation of business as a bank and the furtherance of any other business?

Question objected to by defendant's counsel as irrelevant and calling for secondary evidence, and on the further ground that no proper foundation has been laid for the introduction of such secondary evidence, and that the answer is intended to cover the ground that there was a proper form of action on the part of the stockholders to justify the change of name. Objection overruled. Exception by defendant.

A. Well, in May or June, 1889, after we had quit doing a general banking business, we had a chance to dispose of certain supplies and fixtures to other parties who wanted to engage in the bank business and wanted to have the use of the name of the Arkansas City bank. Mr. Newell was here at that time, and we had a meeting of the stockholders and directors, and we relinquished the name of the Arkansas City bank and selected the name of the
41 Arkansas City Investment Company. And under that name proceeded to do business from that time on.

Defendant moves to strike out the answer of the witness as not being responsive to the question and as giving oral testimony as to the proceedings of the directors and stockholders of the Arkansas City bank, without having laid the proper foundation for the introduction of secondary evidence as to such proceedings.

Motion denied. Defendant excepts.

Q. Was a copy of these proceedings made and furnished to the secretary of state of the State of Kansas at that time?

Objected to by defendant's counsel as immaterial and not calling for the best evidence. Objection overruled. Exception by defendant.

A. There was.

Plaintiff's counsel offered in evidence a duly certified copy from the office of the secretary of state of the State of Kansas of the proceedings of the stockholders of the Arkansas City bank, for the changing of its name; certified by the secretary of the company, and attested by the secretary of state of Kansas.

By DEFENDANT'S COUNSEL: I do not object on the ground that the copy is not properly authenticated as a copy of whatever original paper is on file, but I object on the ground that the evidence is not supported by evidence of action on the part of the stockholders, and, furthermore, that it is not in compliance with the requirements of the laws of Kansas.

Objection overruled. Defendant excepts. Paper admitted in evidence and marked "Plaintiff's Exhibit No. 3."

42 PLAINTIFF'S EXHIBIT No. 3.

STATE OF KANSAS, OFFICE OF THE GOVERNOR.

I, E. N. Morrill, governor of the State of Kansas, do hereby certify that W. C. Edwards is the duly elected, qualified and acting secretary of state of the State of Kansas, and that the signature to the within certificate is his genuine signature and that said certificate and attestation is in due form of law and by the proper officers.

In testimony whereof I have hereunto subscribed my name and caused the great seal of the State of Kansas to be affixed.

Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

[SEAL.] E. N. MORRILL, *Governor.*

STATE OF KANSAS,
OFFICE OF THE SECRETARY OF STATE.

I, W. C. Edwards, secretary of state of the State of Kansas, do hereby certify that the following and annexed is a true and correct copy of the original certificate of change of name of the Arkansas City bank, filed in my office June 5, 1889.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal. Done at Topeka, Kansas, this 21st day of March, A. D. 1896.

[SEAL.] W. C. EDWARDS,
Secretary of State,
By —— ——,
Assistant Secretary of State.

43 STATE OF KANSAS, } ss:
Cowley County, }

I, James L. Huey, being duly sworn, depose and say: That at a meeting of the stockholders of the Arkansas City bank held at Arkansas City, Cowley county, Kansas, on the 25th day of May, A. D. 1889, the stockholders unanimously voted to adopt the name "The Arkansas City Investment Company." And that I am the secretary of said corporation.

JAMES L. HUEY.

Subscribed and sworn to before me this 25th day of May, A. D. 1889.

JOHN H. HARTMAN,
[SEAL.] *Notary Public.*

Commission expires May 15, 1892.
Affidavit filed June 5, 1889.

Q. After this change of name to the Arkansas City Investment Company, was the old stock issued to the Arkansas City bank, surrendered, and any new stock issued?

A. No; there wasn't.

Q. What was done by the new institution with its stockholders in the way of stock?

A. The stock was left standing as it was. No change was made in it. No stock was issued and the old stock was left standing just as it was when it was made.

Q. Then this record that you have produced of the shares of stock issued is the entire record of the stock in the Arkansas City bank and the Arkansas City Investment Company?

A. That's all the record that I know anything about in relation to the stock of the Arkansas City bank and the Arkansas City Investment Company.

Q. What position did you occupy in the Arkansas City Investment Company?

A. I was cashier.

Q. As such officer, did you also act as secretary at the meetings of the stockholders?

44 A. I did.

Q. I believe you have stated that the Arkansas City Investment Company continued its business until December, 1890?

A. Yes.

Q. What was then done?

A. An assignment was made.

Q. (Handing paper.) I now hand you a paper and ask you whose signature is attached to that paper, if you know?

A. (Looking at paper.) It's my signature.

Q. When did you sign that paper?

A. About the 15th day of December, 1890.

Q. Was that the paper you signed at the time of the making of the assignment?

A. It's my opinion—I should say "yes."

Q. Will you permit the notary to identify that paper and attach it to this deposition and make it a part of it?

A. I have no control of it; I can't consent to it.

Plaintiff's counsel then offered in evidence copy of the assignment or deed of assignment, properly authenticated. Admitted in evidence and marked "Plaintiff's Exhibit 4" of this date.

PLAINTIFF'S EXHIBIT 4.

Know all men by these presents, that the Arkansas City Investment Company of Arkansas City, Cowley county, Kansas, for value received, does hereby grant, bargain, sell, assign and convey to Charles A. Scruton, of the same place, all its lands, tenements, goods, chattels, effects and credits for the benefits of all the creditors of the said assignor in proportion to their respective claims.

In witness whereof, the said assignor caused its hand to be hereto

affixed, and these presents attested by its president and secretary, this fifteenth day of December, A. D. 1890.

[The Arkansas City Investment Company Seal.]

SAMUEL NEWELL, *As President.*
J. L. HUEY, *As Secretary.*

45 STATE OF KANSAS, } ss:
Cowley County, }

On this fifteenth day of December, A. D. 1890, before me the undersigned, a notary public in and for Cowley county and State of Kansas, personally came Samuel Newell and James L. Huey, who are personally known to me to be the same persons who executed the within instrument of writing, and such persons duly acknowledged that they executed the same as president and secretary of said company.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

RICHARD U. HESS,
Notary Public.

[SEAL.]

My commission expires July 7th, 1892.

Filed for record on the 15th day of December, A. D. 1890, at 7 o'clock p. m.

A. A. JACKSON,
Register of Deeds,
By GUY L. SPARKS, *Deputy.*

STATE OF KANSAS, } ss:
County of Cowley, }

I, J. D. Maurer, register of deeds in and for said county, do hereby certify that the foregoing is a full and correct copy of the complete record of deed of assignment from the Arkansas City Investment Company to Charles A. Scruton. Recorded in Journal C, page 518, as the same appears in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said office at the city of Winfield this the 6th day of April, A. D. 1896.

J. D. MAURER,
Register of Deeds.

46 STATE OF KANSAS, } ss:
County of Cowley, }

I, J. A. Burnette, judge of the 19th judicial district of said State, and presiding judge of the district court of said county, do hereby certify that J. D. Maurer, by whom the above attestation was made, was, at the date thereof, register of deeds of said county duly qualified, and that the same is in due form of law and made by the proper officer.

Dated April 6th, A. D. 1896.

J. A. BURNETTE, *Judge.*

STATE OF KANSAS, } ss:
County of Cowley, }

I, Adam Staggers, clerk of the district court in and for said county, do hereby certify that Hon. J. A. Burnette, whose genuine signature is subscribed to the foregoing certificate, was at the date thereof presiding judge of said court, duly commissioned, sworn and acting.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Winfield, this the 6th day of April, A. D. 1896.

[SEAL.] ADAM STAGGERS, *Clerk.*

Q. At the time of the making of the deed of assignment, was there also made out a schedule of the liabilities of the Arkansas City Investment Company?

A. Yes, sir.

Q. I ask you to look at the paper you now hold, and state if that is signed by you also?

A. (Looking at paper.) It is.

Q. Do you know what was done with the business of the Arkansas City Investment Company after the making of this assignment?

A. Yes, sir.

Q. You may state it.

47 A. The assets were turned over to the assignee, Charles A. Scruton, who took charge of them and collected and attended to the business until November, 1894, and they were again delivered to me as assignee of the same institution, and the balance on hand on the 4th day of November, 1895, was sold.

Q. After the making of this assignment, was any new business done?

A. No; no new business was done; not as I know of.

Q. (Handing witness paper.) I hand you a paper and ask you to state if you have ever seen it before, and when and where.

A. Well, I saw it at the time it was executed; about September 1, 1890.

Q. Did you see the same signed?

A. I did.

Q. By whom?

A. Silas Kennedy.

Q. What was done with that paper after it was signed by Mr. Kennedy?

Objected to by defendant's counsel as immaterial, because the action is founded upon a judgment of the district court of Kansas against the Arkansas City Investment Company, and the theory of the complaint is that this defendant, as a stockholder of that company, is liable to be charged with the amount of that judgment. That does not call for the proof of the original indebtedness. The question is whether this judgment is a liability on the part of this stockholder.

Objection overruled. Exception by defendant.

A. It was discounted to the National Bank of Oxford, of Oxford, Pennsylvania.

Q. The plaintiff in this case?

A. Yes, sir.

Q. Did you personally attend to the discounting of that paper?

48 A. I did not.

Q. How was it done?

A. Why, through a party in Kansas City by the name of Abell.

Q. Was that discount ever taken up by the Arkansas City Investment Company, while it was an active concern, and before its assignment?

A. No, sir.

Q. Then this paper was outstanding at the time of the making of the deed of assignment?

A. It was.

Q. I see upon the back of this note a rubber stamp and under it in writing the name of J. L. Huey, cashier (handing paper to witness). Please look at it and state if that is your signature.

A. It is my signature; yes.

Q. Did you place the rubber stamp upon the back and above your signature?

A. I did.

Q. That was before the discounting of the note?

A. Yes, sir.

Plaintiff's counsel offers in evidence note dated September 1, 1890, for $2,825, payable to the order of J. L. Huey, signed Silas Kennedy.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked "Plaintiff's Exhibit 5."

49 PLAINTIFF'S EXHIBIT 5.

ARKANSAS CITY, KANSAS, *Sept.* 1, 1890.

Six months after date, for value received, I promise to pay to the order of J. L. Huey, cash., at the office of the Arkansas City Investment Company, twenty-eight hundred & twenty-five dollars with interest at the rate of ten per cent. per annum, payable annually, from maturity until paid. The sureties, g-rantors and endorsers on this note severally agree to, and do hereby waive demand or presentation of this note for payment to the makers hereof, and waive protest and notice of non-payment, and do hereby grant to any holder of this note the right to grant extensions without notifying them, or either of them, hereby ratifying such extensions and remaining bound on this note as if no extension had been obtained.

SILAS KENNEDY.

No. 19403.

$2,825.00.

Due M'ch 1-4, '91.

Notice.

Payable at Gilman Sons & Co., 62 Cedar St., New York City.

(Endorsed:) For value received, I hereby guarantee the payment of the within note, and any renewal of the same, and hereby waive protest, demand and notice of demand and non-payment and suit against the maker, and consent that the payment of this note may be extended from time to time, without affecting my liability thereon. Arkansas City Improvement Co., Arkansas city, Kansas. J. L. Huey, cashier. M'ch 25, '91, rec'd $400.00 of Chas. A. Scruton, assignee; Nov. 25, '92, rec'd of Chas. A. Scruton, assignee, seven hundred forty-seven & $\frac{12}{100}$ dollars, being 30 % div. on claim of $2,490.65 allowed Oct. 26, '92.

50 Q. I hand you another note, dated August 4, 1890 (handing note), and will ask you whether you have ever seen that note before.

A. Yes, sir.

Q. Where?

A. In the Arkansas City Investment Company, after its execution August 4, 1890.

Q. Did you see it signed?

A. Yes, sir.

Q. Was it executed in your presence?

A. It was.

Q. And do you know the signatures?

A. I do.

Q. You may state whose they are.

A. J. D. Harkleroad and E. C. Harkleroad.

Q. What was done with that note after its execution and delivery to the Arkansas City Investment Company?

A. It was discounted through the National Bank of Oxford through Mr. Abell.

Q. The plaintiff in this case?

A. The plaintiff in this case.

Q. Did you place the endorsement upon the back of that note which appears there?

A. Yes, sir.

Q. I mean by that endorsement of the Arkansas City Investment Company?

A. Of the Arkansas City Investment Company and also mine, as J. L. Huey, cashier.

Q. Was that note ever taken up by the Arkansas City Investment Company before its assignment?

A. It was not.

Plaintiff's counsel offers in evidence note dated August 4, 1890, for $2,050, payable to the order of J. L. Huey, cashier, signed by J. D. Harkleroad and E. C. Harkleroad.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

51 Said note was received in evidence and marked "Plaintiff's Exhibit 6" of this date.

PLAINTIFF'S EXHIBIT 6.

ARKANSAS CITY, KANSAS, *Aug.* 4, 1890.

Payable at Gilman Sons & Co., 62 Cedar St., New York city.

Six months after date, for value received, I promise to pay to the order of J. L. Huey, cash., at the office of the Arkansas City Investment Company, twenty hundred and fifty dollars with interest at the rate of ten per cent. per annum, payable annually, from maturity until paid. The sureties, guarantors and endorsers on this note severally agree to, and do hereby, waive demand or presentation of this note for payment to the makers hereof, and waive protest and notice of non-payment, and do hereby grant to any holder of this note the right to grant extensions without notifying them, or either of them, hereby ratifying such extensions and remaining bound on this note as if no extension had been obtained.

J. D. HARKLEROAD.
E. C. HARKLEROAD.

No. 19,356.

$2,050.00.

Due Feb. 4–7, '91.

Notice.

(Endorsed:) For value received I hereby guarantee the payment of the within note, and any renewal of the same, and hereby waive protest, demand and notice of demand, and non-payment and suit against the maker, and consent that the payment of this note
52 may be extended from time to time, without affecting my liability thereon. Arkansas City Investment Co., Arkansas city, Kansas. J. L. Huey, cash.

Feb'y 11, '92	rec'd	.....	$700 00
Dec. 2, '92	"	.....	425 00
Dec. 10, '92	"	.....	175 00
May 31, '92	"	.....	100 00
M'ch 31, '94	"	.....	200 00
M'ch 31, '94	"	of Chas. A. Scruton, assignee	155 67

Q. What did the Arkansas City Investment Company receive for both of these notes which you have just described, when they were discounted, as you have stated?

A. Why, they were discounted at the rate of eight per cent. per annum, and we received exchange on Kansas City and New York, for the proceeds from Kansas City.

Q. What do you mean by "we," in your last answer?

A. Why the Arkansas City Investment Company.

Q. I believe that you have stated that you became assignee of the Arkansas City Investment Company and a successor to Charles A.

Scruton, its former assignee, in or about November, 1894. Have you continued to handle this trust since that time?

A. Yes, sir.

Q. What has been done with the assets that were turned over to you by Mr. Scruton?

A. They were sold, nearly all of them, on the 4th of November, 1895.

Q. After paying the expenses of the trust, including all expenses until it is wound up, how much remains from the proceeds of the sale of these assets?

A. Nothing.

53 Q. During the management of the trust by you, were any dividends declared and paid to the creditors?

A. No, sir.

Q Then at this time there remain no assets with which to make any payments to the creditors of the Arkansas City Investment Company?

A. There are none; no, sir.

Q. Have you made a final report as assignee?

A. I have.

Q. And asked a discharge by the court?

A. I did.

Q. When did you make and file your final report and petition for this discharge?

A. 6th of January, 1896.

Plaintiff's counsel offered in evidence an order of the Kansas court discharging the assignee of the Kansas City Investment Company.

Objected to by the defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Order admitted in evidence, marked "Plaintiff's Exhibit 7" of this date.

PLAINTIFF'S EXHIBIT 7.

Be it remembered, that on this 2nd day of June, A. D. 1896, the same being the first judicial day of the regular June term in the year 1896, of the district court of the nineteenth judicial district of the State of Kansas, sitting in and for the county of Cowley, court convened, there being present the Honorable J. A. Burnette, sole presiding judge of said court, Adam Staggers, clerk of said court, and J. W. Skinner, shereiff of said county:

54 Whereupon the following proceedings were had:

Assignment of the Arkansas City Investment Co. No. 5239.

Now on this 2nd day of June, 1896, this cause comes on for hearing on the motion of James L. Huey, assignee, for an order approving and confirming the report of the commissioner herein, C. T. Atkinson, and also for an order approving and confirming the several reports of the said assignee, James L. Huey, and all his pro-

ceedings and for allowance of his compensation, and also compensation of said commissioner, and for discharge of said assignee together with his bondsmen from all liability. The said assignee appearing by Troup & Brown, his attorneys, and the said commissioner, C. T. Atkinson, appearing in person, and several creditors of said estate appearing by Madden & Buckman and Pollock & Love, their respective attorneys.

Thereupon the court finds after a full examination of the facts herein that said motion should be sustained, and that said assignee has in his hands at this time the sum of nineteen hundred and fifty-one and $\frac{27}{100}$ dollars, to be paid as hereinafter directed.

It is, therefore, ordered, adjudged and decreed by the court, that said motion be and the same is hereby sustained, and it is further ordered and decreed, that the report of said commissioner be and the same is approved, together with the several reports of the said James L. Huey as assignee, and he is hereby discharged, and, together with his bondsmen, released from all liability
55 herein. Said assignee is allowed as compensation for his services herein for his full term the sum of nine hundred ($900) dollars, and said commissioner is also allowed the sum of fifty ($50) dollars for his services herein, together with the services of stenographer, in making said report.

It is also further ordered, that the balance in the hands of said assignee at this time, being the sum of one thousand and one and $\frac{27}{100}$ ($1,001.27) dollars, be by him paid as follows, to wit: To Troup & Brown, the sum of twenty-five dollars ($25); to A. D. Norton and K. A. Norton, the sum of four hundred and twenty-five — ($425), to apply on the two judgments in cases Nos. 5249 and 5250, and to the clerk of this court on account of unpaid court costs in several cases the sum of five hundred and fifty-one and $\frac{27}{100}$ ($551.27) dollars.

It is further provided that said assignee shall not be discharged nor relieved from liability until such payments are duly made.

STATE OF KANSAS, } ss:
Cowley County, }

I, Adam Staggers, clerk of the district court in and for said county, do hereby certify that the within and foregoing is a full, true and correct copy of certain proceedings had in said court, in the case therein entitled, as the same appears of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office, in the city of Winfield, this 2d day of June, 1896.

[SEAL.] ADAM STAGGERS, *Clerk.*

STATE OF KANSAS, } ss:
County of Cowley, }

I, Adam Staggers, clerk of the district court in and for said county, do hereby certify, that the foregoing is a full and correct copy of the complete record of the journal entry discharging
56 the assignee of the case therein entitled, as the same appears in my office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at the city of Winfield, this 2d day of June, A. D. 1896.

[SEAL.] ADAM STAGGERS, *Clerk.*

STATE OF KANSAS, } ss:
County of Cowley, }

I, J. A. Burnette, judge of the 19th judicial district of said State, and presiding judge of the district court of said county, do hereby certify that Adams Staggers, by whom the above attestation was made, was, at the date thereof, clerk of said court, duly qualified, and that the same is in due form of law and made by the proper officer.

Dated June 2d, A. D. 1896.

J. A. BURNETTE, *Judge.*

STATE OF KANSAS, } ss:
County of Cowley, }

I, Adam Staggers, clerk of the district court in and for said county, do hereby certify that Hon. J. A. Burnette, whose genuine signature is subscribed to the foregoing certificate, was at the date thereof presiding judge of said court, duly commissioned, sworn and acting.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at the city of Winfield, this the 2d day of June, A. D. 1896.

[SEAL.] ADAM STAGGERS, *Clerk.*

Q. Do you remember the instance of the execution that the witness, J. W. Skinner, has testified about?

A. Yes.

Q. Do you know the condition of the assets of the Arkansas City Investment Company at that time?

57 A. Pretty well; yes.

Q. Do you know whether or not there were any assets which could have been subjected to that process then in the hands of the sheriff?

A. I don't think there was any from the information that I got from counsel.

Q. You have had a thorough knowledge of the condition of those assets from the time of the original assignment down to the present time, have you not?

A. Pretty well; yes.

Q. Since the making of the deed of assignment has the Arkansas City Investment Company transacted any business whatever to your knowledge?

A. No, sir; well, the company has not been transacting any business that I have any knowledge of.

Q. Has never been reorganized and has never resumed business?

A. No, sir.

Q. There will be nothing further then for distribution among the creditors of the Arkansas City Investment Company?

A. No, sir; there won't be anything. After the expenses are paid there won't be any money left.

Cross-examination read by DEFENDANT'S COUNSEL:

Q. Mr. Huey, did I understand you to say that when the Arkansas City bank sold out its business that the old company then retired from the banking business?

A. Yes.

Q. Who purchased the Arkansas City bank?

A. Well, there were two sales, really; the accounts were transferred to the First national bank and the furniture and safe and supplies were purchased by the Second Arkansas City bank, headed by Britton and Hartman.

Q. Was the bank business continued at the old banking-house of the Arkansas City bank?

A. Yes.

58 Q. Under what name was that continued?

A. That was continued under the Arkansas City bank.

Q. The banking business then continued under the name of the Arkansas City bank at the old stand?

A. I can't say that it continued because they did not commence business until a month after we transferred the accounts to the First national bank.

Q. When they did continue business they continued at the old stand of the Arkansas City bank and under that name?

A. Yes, sir.

—. And at the time that the Arkansas City Investment Company was operating and doing business here, the Arkansas City bank was also doing business?

A. Yes.

Redirect examination read by PLAINTIFF'S COUNSEL:

Q. The Arkansas City bank, that was also doing business, was a new and different institution altogether, wasn't it?

A. It was a new corporation with different men in it and different amount of capital, and incorporated June, 1889.

Q. It was not a continuation of the old Arkansas City bank, with which you were connected, was it?

A. No, sir; had nothing to do with it. It was not a continuation of the old Arkansas City bank.

Q. Was this new Arkansas City bank in any manner connected with the Arkansas City Investment Company?

A. Not at all; no way or shape.

Q. The Arkansas City Investment Company, that was a continuation of the old Arkansas City bank, as you have stated, did business at a different place also from the Arkansas City bank, did it not?

A. When the new Arkansas City bank was organized, the Arkan-

sas City Investment Company moved into other quarters out of the building.

59 Q. The second institution was then run in a different place?

A. They were.

Q. Managed by different men?

A. Yes, sir.

Plaintiff's counsel then offered in evidence certified paper purporting to be a judgment of the district court of Cowley county, Kansas, in favor of this plaintiff and against the Arkansas City Investment Company.

DEFENDANT'S COUNSEL: I raise no question in regard to the authentication of the copy which is offered, but I do object to the judgment itself as not a judgment against the defendant in this action, and purely *res inter alios*, and, therefore, no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action.

Objection overruled. Exception by defendant. Judgment admitted in evidence and marked "Plaintiff's Exhibit 8" of this date.

PLAINTIFF'S EXHIBIT NO. 8.

STATE OF KANSAS, } ss:
Thirteenth Judicial District, Cowley County, }

Be it remembered, that on this 16th day of April, A. D. 1895, the same being the 13th judicial day of the regular April term, in the year 1895, of the district court of the thirteenth judicial district of the State of Kansas, sitting in and for the county of Cowley, court convened pursuant to adjournment, there being present the Honorable A. M. Jackson, sole presiding judge of said court, Adam Staggers, clerk of said court, and J. W. Skinner, sheriff of said county.

60 Whereupon the following proceedings were had:

THE NATIONAL BANK OF OXFORD, PENNSYLVANIA, Plaintiff, *vs.* THE ARKANSAS CITY INVESTMENT COMPANY, Defendant. } No. 7399.

Now, on this day, the said plaintiff appearing by its attorneys, Troup & Brown, and the defendant appearing not, this cause comes regularly on for trial, and the parties appearing having waived the right to have the same heard and tried by a jury, it was heard and tried by the court. Thereupon the plaintiff introduces its evidence and rests its case, and the court on consideration thereof doth find that the said defendant has been duly, lawfully and personally served with summons of the pendency of this action, and has appeared herein and answered the petition of the plaintiff.

The court doth further find that the said defendant, The Arkansas City Investment Company is indebted to the plaintiff, The National Bank of Oxford, Pennsylvania, upon the promissory notes mentioned and set forth in the plaintiff's petition and sued on in this action in the sum of $3,449, with interest from this date, at the rate of ten per cent. per annum.

It is therefore considered, ordered, adjudged and decreed by the court that the National Bank of Oxford, Pennsylvania, do have and recover of and from the said defendant, The Arkansas City Investment Company, upon the promissory note sued on herein,
61 judgment in the sum of $3,449, with interest thereon at the rate of ten per cent. per annum from this date, together with the costs of this action now here taxed at $19.30, and therefor- let execution issue after ten days from this date.

Defendant's counsel then read in evidence a stipulation made in this action as follows:

"It is hereby stipulated and admitted that in the action in the district court within the State of Kansas, referred to in the complaint herein, and in the depositions taken by the plaintiff herein without the State of Kansas, no summons or other process was served upon the defendant, but the same was taken by the entry of appearance, a copy of which is embraced in the copy of the judgment of the National Bank of Oxford against the Arkansas City Investment Company, attached to the said depositions and now on file.

(Signed) HORNBLOWER, BYRNE & TAYLOR.
WILSON & WALLIS."

Plaintiff's counsel offers in evidence an execution issued under the said judgment against the Arkansas City Investment Company to the sheriff of Cowley county, Kansas, and return of the same unsatisfied.

Defendant's counsel objects to the same as not against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action.

Objection overruled. Exception by defendant. Execution admitted in evidence.

62 *Execution and Endorsement.*

UNITED STATES OF AMERICA, }
State of Kansas, County of Cowley. }

In the District Court of the Thirteenth Judicial District, Sitting in and for said County.

THE NATIONAL BANK OF OXFORD, PENNSYLVANIA, Plaintiff, *versus* THE ARKANSAS CITY INVESTMENT COMPANY, Defendant. } Execution.

The State of Kansas to the sheriff of Cowley county, in said State, Greeting:

Whereas, the National Bank of Oxford, Pennsylvania, on the 16th day of April, A. D. 1895, obtained judgment before the thirteenth judicial district court of the State of Kansas, within and for Cowley county, against the Arkansas City Investment Company, for the sum of thirty-four hundred forty-nine and $\frac{0}{100}$ ($3,449) dollars debt, and also for the sum of nineteen and $\frac{30}{100}$ ($19.30) dollars as costs in said behalf expended, with interest at the rate of 10 per cent. per annum, and there has accrued nine and $\frac{0}{100}$ ($9) dollars, and there has been paid, A. D. 18—, the sum of — dollars.

And whereas, there remains unpaid on such judgment the sum of thirty-four hundred, forty-nine and $\frac{0}{100}$ dollars, together with $19.30 costs; $9 accrued costs and interest and the accruing costs on this execution, less — paid as aforesaid:

63 Now, therefore, you are hereby commanded that of the goods and chattels of said The Arkansas City Investment Company, you cause the money above specified to be made, and for want of goods and chattels you cause the same to be made of the lands and tenements of said debtor and make return of this execution, with your certificate thereon, showing the manner you have executed the same within sixty days from the date hereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Winfield in said county, this 30th day of April, A. D. 1895.

ADAM STAGGERS,
[SEAL.] *Clerk of the District Court,*
By H. A. TONKINSON, *Deputy.*

Sheriff's Return.

Received this writ April 30, 1895.

After diligent search I cannot find any property whereon to levy this writ and therefor- return the same wholly unsatisfied.

J. W. SKINNER, *Sheriff,*
By IRA BARNETT, *Deputy.*

J. W. Skinner testified that there could not be found by the sheriff of the county of Cowley, in the State of Kansas, to whom the execution was directed, any property of the Arkansas City Investment Company whereon to levy such execution; that the sheriff exercised all possible diligence in endeavoring to find property and effects of the corporation whereon to levy; that he returned the execution wholly unsatisfied and before doing so entirely exhausted the assets and property of the Arkansas City Investment Company.

(Plaintiff rests.)

(Defendant rests.)

64 Plaintiff's counsel moves the court to direct a verdict for the plaintiff.

Defendant's counsel moves the court to direct a verdict for the defendant, upon the following grounds:

That the action must be sustained, if at all, upon the provisions of the Kansas statutes, and the provisions of the constitution of Kansas are not self-executing, and have no force excepting in so far as they have been given effect by statutory enactments. That the action is founded upon a judgment of a Kansas court against a Kansas corporation, and that such judgment can be enforced against a stockholder of such corporation only by virtue of the Kansas statutes, and only within the territorial limits of the State of Kansas, and elsewhere is no judgment against the stockholder and is *res inter alios*. That the remedy provided by the Kansas statutes has no extraterritorial force outside the limits of the State of Kansas, but is a statutory proceeding to enforce a Kansas judgment against a Kansas corporation, as a personal liability of a stockholder in the corporation who is not a party to the judgment or to the action in which the judgment has been recovered. That the liability imposed upon stockholders by the Kansas statutes is not a general liability, as upon contract, for the debts of a corporation, but a special, limited and contingent liability, coupled with a special and peculiar remedy created by the same statute and not known to the common law; that whatever obligations or liabilities imposed by such statutes the defendant accepted by accepting the stock of the Kansas corporation were to the same extent accepted subject to their being enforced only in the manner provided in the same statutes and with the full benefit to the defendant of all the protections and safeguards afforded by the same statutes; and that it was neither practicable that such protections and safeguards shall be afforded to the defendant in pro-

65 ceedings brought in other States than Kansas, nor competent for the State of Kansas or its legislature to prescribe new forms of procedure for the courts of other States or of the United States beyond the limits of Kansas. That the remedies which can be enforced in this action are those afforded by the *lex fori*, and the *lex fori* is the law as administered in the State of New York, the jurisdiction of this court and that of the courts of New York State being concurrent, and the procedure being the same in both, in actions at common law; and that this action could not be main-

tained in the courts of New York State. That the alleged jurisdiction of the Kansas court to award the judgment upon which this action is founded rests upon the voluntary appearance of the Kansas corporation, and such appearance, being entered by the former cashier of that corporation over two years after its dissolution, was unauthorized and ineffectual to confer any jurisdiction upon the Kansas court. That this court has no jurisdiction over the subject of the action, and no jurisdiction to enforce a statutory remedy of the State of Kansas. That no cause of action is alleged in the complaint; and that no cause of action has been proved upon the trial.

The court denied defendant's motion, and said: "You may take a verdict for the plaintiff and you may enter a motion to set aside the verdict. I will look at this case, and if I think it ought to be set aside I will rule upon that question then. All further proceedings to be stayed until the determination of that motion."

Defendant's counsel excepts to the denial of defendant's motion for the direction of a verdict for defendant, and to the ruling of the court directing a verdict for the plaintiff.

Under the direction of the court the jury rendered a verdict for the plaintiff in the sum of $3,468.30, with interest at ten per cent., from April 16, 1895, amounting in all to the sum of $3,868.05.

66 Thereafter the court denied defendant's motion to set aside the verdict and directed the entry of judgment thereon, to which denial and direction the defendant excepted.

It is consented that the foregoing be settled and ordered on file as the defendant's bill of exceptions herein.

Dated October 14, 1896.

HORNBLOWER, BYRNES,
TAYLOR & MILLER,
Plaintiff's Attorneys.
WILSON & WALLIS,
Defendant's Attorneys.

Whereupon the foregoing is settled, signed and allowed by me as the defendant's bill of exceptions herein.

HOYT H. WHEELER,
Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of N. Y. National Bank of Oxford against George L. Whitman. Defendant's bill of exceptions. Wilson & Wallis, att'ys for def't, 48 Wall St., N. Y. city. U. S. circuit court. Filed Dec. 3, 1896. John A. Shields, clerk.

67 United States Circuit Court, Southern District of New York.

NATIONAL BANK OF OXFORD
against
GEORGE L. WHITMAN.

Afterwards, to wit, on the 4th day of December, 1896, before the judges of the United States circuit court of appeals for the second

circuit, at the city of New York, in the State of New York, comes the said George L. Whitman, by Wilson & Wallis, his attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in the rulings and decisions and directions of the judge before whom the issues joined between the parties hereto were tried, as also in other respects and particulars, and especially in this, to wit:

(P. 10.) First. That said judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows:

Q. You may now state what was done by the stockholders and officers of the Arkansas City bank, with reference to the cessation of business as a bank, and the furtherance of other business.

Question objected to by defendant's counsel as irrelevant and calling for secondary evidence, and on the further ground that no proper foundation has been laid for the introduction of such
68 secondary evidence, and that the answer is intended to cover the ground that there was a proper form of action on the part of the stockholders to justify the change of name. Objection overruled. Exception by defendant.

A. Well, in May or June, 1889, after we had quit doing a general banking business, we had a chance to dispose of certain supplies and fixtures to other parties who wanted to engage in the bank business, and wanted to have the use of the name of the Arkansas City bank. Mr. Newell was here at that time, and we had a meeting of the stockholders and directors, and we relinquished the name of the Arkansas City bank and selected the name of the Arkansas City Investment Company, and under that name proceeded to do business from that time on.

Defendant moves to strike out the answer of the witness as not being responsive to the question, and as giving oral testimony as to the proceedings of the directors and stockholders of the Arkansas City bank, without having laid the proper foundation for the introduction of secondary evidence as to such proceedings. Motion denied. Defendant excepts.

(P. 11.) Second. That said judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows:

Q. Was a copy of these proceedings made and furnished to the secretary of state of the State of Kansas at that time?

Objected to by defendant's counsel as immaterial and not calling for the best evidence. Objection overruled. Exception by defendant.

A. There was.

(P. 11.) Third. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offered in evidence a duly certified copy
69 from the office of the secretary of state of the State of Kansas of the proceedings of the stockholders of the Arkansas City bank, for the changing of its name certified by the secretary of the company and attested by the secretary of state of Kansas.

By DEFENDANT'S COUNSEL: "I do not object on the ground that the copy is not properly authenticated as a copy of whatever original paper is on file, but I object on the ground that the evidence is not supported by evidence of action on the part of the stockholders; and, furthermore, that it is not in compliance with the requirements of the laws of Kansas."

Objection overruled. Defendant excepts.

Paper admitted in evidence and marked Plaintiff's Exhibit 3.

(P. 15.) Fourth. That said judge on said trial admitted in evidence the testimony of one J. L. Huey, as follows:

Q. What was done with that paper after it was signed by Mr. Kennedy?

Objected to by defendant's counsel as immaterial, because the action is founded upon a judgment of the district court of Kansas against the Arkansas City Investment Company, and the theory of the complaint is that this defendant, as a stockholder of that company, is liable to be charged with the amount of that judgment. That does not call for the proof of the original indebtedness. The question is whether this judgment is a liability on the part of this stockholder.

Objection overruled. Exception by defendant.

A. It was discounted to the National Bank of Oxford, Pennsylvania.

70 (P. 16.) Fifth. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offers in evidence note dated September 1, 1890, for $2,825, payable to the order of J. L. Huey, signed Silas Kennedy.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked Plaintiff's Exhibit 5.

(P. 17.) Sixth. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offers in evidence note dated August 4, 1890, for $2,050, payable to the order of J. L. Huey, cashier, signed by J. D. Harkleroad and E. C. Harkleroad.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Said note was received in evidence and marked Plaintiff's Exhibit 6.

(P. 19.) Seventh. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offered in evidence an order of the Kansas

court, discharging the assignee of the Arkansas City Investment Company.

Objected to by defendant's counsel as immaterial and irrelevant. Objection overruled. Exception by defendant.

Order admitted in evidence, marked Plaintiff's Exhibit 7.

71 (P. 22.) Eighth. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel then offered in evidence certified paper purporting to be a judgment of the district court of Cowley county, Kansas, in favor of this plaintiff and against the Arkansas City Investment Company.

DEFENDANT'S COUNSEL: "I raise no question in regard to the authentication of the copy which is offered, but I do object to the judgment itself as not a judgment against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action."

Objection overruled. Exception by defendant.

Judgment admitted in evidence and marked Plaintiff's Exhibit 8.

(P. 23) Ninth. That said judge on said trial admitted in evidence a certain paper or document, as follows:

Plaintiff's counsel offers in evidence an execution issued under the said judgment against the Arkansas City Investment Company to the sheriff of Cowley county, Kansas, and return of the same unsatisfied.

Defendant's counsel objects to the same as not against the defendant in this action, and purely *res inter alios*, and therefore no evidence against this defendant for any purpose whatever, and no evidence for the purpose of establishing any liability on the part of the defendant in this action. Objection overruled. Exception by defendant.

Execution admitted in evidence.

72 (P. 24.) Tenth. That said judge on said trial refused to direct a verdict for the defendant, and directed a verdict for the plaintiff as follows:

Plaintiff's counsel moves the court to direct a verdict for the plaintiff. Defendant's counsel moves the court to direct a verdict for the defendant upon the following grounds:

That the action must be sustained, if at all, upon the provisions of the Kansas statutes, and the provisions of the constitution of Kansas are not self-executing, and have no force excepting in so far as they have been given effect by statutory enactments. That the action is founded upon a judgment of a Kansas court against a Kansas corporation, and that such judgment can be enforced against a stockholder of such corporation only by virtue of the Kansas statutes, and only within the territorial limits of the State of Kansas and elsewhere, is no judgment against the stockholder, and is *res inter alios*. That the remedy provided by the Kansas statutes has no extraterritorial force outside the limits of the State of Kansas, but is a statutory proceeding to enforce a Kansas judgment against

a Kansas corporation as a personal liability of a stockholder in the corporation who is not a party to the judgment or to the action in which the judgment has been recovered. That the liability imposed upon stockholders by the Kansas statutes is not a general liability, as upon contract, for the debts of a corporation, but a special, limited and contingent liability, coupled with a special and peculiar remedy created by the same statute and not known to the common law; that whatever obligations or liabilities imposed by such statutes the defendant accepted by accepting the stock of the Kansas corporation, were to the same extent accepted subject to their being enforced only in the manner provided in the same statutes, and with the
73 full benefit to the defendant of all the protections and safeguards afforded by the same statutes; and that it was neither practicable that such protections and safeguards shall be afforded to the defendant in proceedings brought in other States than Kansas, nor competent for the State of Kansas or its legislature to prescribe new forms of procedure for the courts of other States or of the United States beyond the limits of Kansas. That the remedies which can be enforced in this action are those afforded by the *lex fori*, and the *lex fori* is the law as administered in the State of New York, the jurisdiction of this court and that of the courts of New York State being concurrent, and the procedure being the same in both in actions at common law; and that this action could not be maintained in the courts of New York State. That the alleged jurisdiction of the Kansas court to award the judgment upon which this action is founded rests upon the voluntary appearance of the Kansas corporation, and such appearance being entered by the former cashier of that corporation over two years after its dissolution, was unauthorized and ineffectual to confer any jurisdiction upon the Kansas court. That this court has no jurisdiction over the subject of the action, and no jurisdiction to enforce a statutory remedy of the State of Kansas. That no cause of action is alleged in the complaint; and that no cause of action has been proved upon the trial.

The court denied defendant's motion and said: "You may take a verdict for the plaintiff and you may enter a motion to set aside the verdict. I will look at this case, and if I think it ought to be set aside I will rule upon that question then. All further proceedings to be stayed until the determination of that motion."

Defendant's counsel excepts to the denial of defendant's
74 motion for the direction of a verdict for defendant and to the ruling of the court directing a verdict for the plaintiff.

(P. 26.) Eleventh. That the jury upon said trial under the direction of the said judge rendered a verdict for the plaintiff, and such verdict was contrary to the evidence in the case.

(P. 26.) Twelfth. That the jury upon said trial under the direction of the said judge rendered a verdict for the plaintiff, and such verdict was contrary to law.

(P. 26.) Thirteenth. That the said judge upon the conclusion of said trial refused to set aside the said verdict and directed judgment thereon as follows:

Therefore the court denied defendant's motion to set aside the verdict and directed the entry of judgment thereon, to which denial and direction the defendant excepted.

And the said George L Whitman prays that the judgment aforesaid may be reversed and altogether held for naught and that he may be restored to all things which he has lost by reason of the said judgment, &c.

WILSON & WALLIS,
Attorneys and of Counsel for Plaintiff in Error.

(Endorsed:) U. S. circuit court, southern district of N. Y. National Bank of Oxford ag'st George L. Whitman. Assignment of errors. Wilson & Wallis, def't's att'ys, 48 Wall St., N. Y. city. U. S. circuit court. Filed Dec. 4, 1896. John A. Shields, clerk.

75 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THE NATIONAL BANK OF OXFORD, Plaintiff, *vs.* GEORGE L. WHITMAN, Defendant. } Bond for Damages and Costs.

Know all men by these presents, that we, George L. Whitman, residing at No. 7 East Forty-fourth street in the city of New York, as principal, and the American Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto the above-named National Bank of Oxford in the sum of five thousand dollars, to be paid to the said National Bank of Oxford, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, successors, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the third day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, the above-named George L. Whitman has prosecuted a writ of error to the United States circuit court of appeals, for the second circuit, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States, for the southern district of New York;

76 Now, therefore, the condition of this obligation is such, that if the above-named George L. Whitman shall prosecute the said writ to effect and answer all damages and costs, if George L. Whitman fails to make his plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEO. L. WHITMAN. [SEAL.]
AMERICAN SURETY CO. OF NEW YORK.
DAVID B. SICKELS, *2d Vice-President.*
CORTLANDT S. VAN RENSSELAER, *Attorney.*

Sealed and delivered and taken and acknowledged this 4th day of December, 1896, before me,

L. E. CARMAN,
[SEAL.] *Notary Public, New York Co.*

Certs. filed in Kings, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk and Rockland Co.'s.

SOUTHERN DISTRICT OF NEW YORK, } ss:
State, City, and County of New York, }

On this 4th day of December, 1896, before me personally appeared David B. Sickels, 2d vice-president of the American Surety Company of New York, with whom I am personally acquainted, who being by me duly sworn, said: That he resided in the city of New York, that he is the 2d vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of trustees of said company, and that he signed said instrument as 2d vice-president of said company by like authority; and that the liabili-
77 ties of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 720, of the New York Session Laws of 1893. And the said David B. Sickels, further said that he was acquainted with Cortlandt S. Van Rensselaer, and knew him to be one of the attorneys of said company; that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of trustees, and in the presence of him the said David B. Sickels, 2d vice-president.

WM. H. BISHOP,
Notary Public (206), *New York Co.*

Certs. filed in Kings, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk and Rockland Co.'s.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

78 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

—, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said

company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 4th day of December, 1896.

[SEAL.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

(Cut.)

Incorporated April 14, 1884

American Surety Company of New York. General offices, 100 Broadway.

Financial Statement, December 31, 1895.

Resources:		
Real estate and improvements	$3,152,175.52	
Less payables	100,000.00	
		$3,052,175 52
United States registered bonds		445,000 00
Other stocks and bonds		662,526 25
First liens and mortgages owned		323,909 99
Mortgage loans and bills receivable		115,623 76
Accrued interest and dividends		42,444 89
Cash in banks and offices		84,407 44
Premiums in course of collection		149,840 06
		$4,875,927 91
79 Liabilities:		
Capital stock		$2,500,000 00
Surplus		1,000,000 00
Undivided profits		568,522 74
Premium reserve requirement		568,999 06
Claims in process of adjustment		224,269 09
Collateral and trust funds		14,137 02
		$4,875,927 91

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Cortlandt S. Van Rensselaer, being duly sworn, deposes and says: That he is one of the attorneys of the American Surety Company of New York, and that the foregoing is a true and correct statement of the financial condition of said surety company, as of December 31, 1895, to the best of his knowledge and belief.

CORTLANDT S. VAN RENSSELAER.

Sworn to before me this 4th day of December, 1896.

WM. H. BISHOP,

[SEAL.] *Notary Public* (206), *New York County.*

Approved:

HORNBLOWER, BYRNE & TAYLOR,
Solicitors for Plaintiff.

New York, December 4, 1896.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. The National Bank of Oxford ag'st George L. Whitman. Bond for damages and costs. Wilson & Wallis, att'ys for def't, 48 Wall St., N. Y. city. Approved and allowed Dec. 4, 1896. E. Henry Lacombe, circuit judge. U. S. circuit court. Filed Dec. 4, 1896. John A. Shields, clerk.

80 THE UNITED STATES OF AMERICA, *ss*:

To the National Bank of Oxford, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the second circuit, to be holden at the city of New York, on the second day of January, 1897, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein George L. Whitman is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated December 4, 1896.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S circuit court of appeals. George L. Whitman, pl'ff in error, ag'st National Bank of Oxford, def't in error. Citation. Wilson & Wallis, att'ys for pl'ff in error, 48 Wall St., N. Y. city. Due service of copy of the within citation is hereby admitted this 8th day of Dec., 1896. Hornblower, Byrnes & Taylor, att'ys for def't in error. U. S. circuit court. Filed Dec. 9, 1896. John A. Shields, clerk.

81 U. S. Circuit Court of Appeals for the Second Circuit.

GEORGE L. WHITMAN, Plaintiff in Error,
against
NATIONAL BANK OF OXFORD, Defendant in Error.

It is hereby stipulated that a copy of the entry of appearance referred to in the stipulation upon page 61 of the Transcript of Record herein, which was accidentally omitted in making up and printing the record, may be now printed and inserted at the proper place therein as part of such record, and that an order may be entered herein to that effect.

Dated New York, April 17, 1897.

HORNBLOWER, BYRNE & TAYLOR,
Counsel for Defendant in Error.
WILSON & WALLIS,
Counsel for Plaintiff in Error.

(Endorsed:) United States circuit court of appeals, second circuit. Filed Apr. 17, 1897. James C. Reed, clerk.

82 In the District Court of Cowley County, Kansas.

THE NATIONAL BANK OF OXFORD, Pennsylvania, Plaintiff,
vs.
THE ARKANSAS CITY INVESTMENT COMPANY, Defendant.
} Entry of Appearance.

Comes now the said defendant, The Arkansas City Investment Company, and enters its appearance herein and waives the issuance of process and service of summons upon it, and submits to the jurisdiction of this court in this cause for all of the purposes of this suit.

The said defendant, however, reserves the right to answer or plead herein on or before the 14th day of January, A. D. 1895.

THE ARKANSAS CITY INVESTMENT COMPANY,
By J. L. HUEY, *Cashier and Managing Officer.*

83 United States Circuit Court of Appeals for the Second Circuit, October Term, 1896.

Submitted May 25, 1897; decided July 21, 1897.

GEORGE L. WHITMAN, Plaintiff in Error,
vs.
THE NATIONAL BANK OF OXFORD, Defendant in Error.
} No. 135.

In error to the circuit court of the United States for the southern district of New York.

Before Judges Wallace, Lacombe, and Shipman.

The constitution of the State of Kansas provided, prior to the year 1866, and still provides, in section 2 of article XII, as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

Section 32 of chapter 23 of the General Statutes of Kansas of 1868, section 40 of the same chapter, as amended in 1883, and section 44 of the same chapter, which are still the statutes of the State, provided as follows:

SECTION 32. "If an execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount
84 to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue

against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Section 40, as amended: "A corporation is dissolved: first, by the expiration of the time limited in its charter, second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

SECTION 44. "If any corporation created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The Arkansas City bank was formed in 1886, under the laws of the State of Kansas, to do a banking and real-estate business with a capital of $20,000, divided into 2,000 shares of $100 each, and was located in Arkansas City in said State. The original stockholders, their residences and the number of the shares of each stockholder were as follows:

George L. Whitman,	New York city,	1,000 shares.
Samuel Newell,	" " "	649 "
James L. Huey,	Arkansas City,	349 "
Mary L. Newell,	New York city,	1 "
Mary E. Huey,	" " "	1 "

In 1889 the name of the bank was changed and became the Arkansas City Investment Company. In December 1890 it made a general assignment for the benefit of its creditors and from that time completely suspended its business, and thereafter at the expiration of one year was deemed to be dissolved under the provisions of section 40 for the purpose of enabling its creditors to sue its stock-

holders. About four months before its failure it endorsed and guaranteed for value two promissory notes, together amounting to $4,875, which were discounted by the plaintiff, The National Bank of Oxford, located in Pennsylvania. The assignee made payments upon these notes from time to time but, in 1895, the plaintiff duly obtained judgment against the bank, in a State court of Kansas, for the sum of $3,468.30, the bank having appeared and having made answer to the complaint. An execution upon this judgment was returned to court wholly unsatisfied, and it appeared that the bank had at that time no assets or property. The plaintiff thereupon brought an action at law in the circuit court for the southern district of New York, against the defendant, George L. Whitman, being the owner of one thousand shares of the stock of this bank, to recover from him the amount due to the plaintiff from said bank.

The complaint in the action alleged all the foregoing facts.
86 The defendant had not, theretofore, been subjected to any liability as a stockholder of the bank.

At the close of the trial of this suit before a jury, each party moved for the direction of a verdict in its favor. The court directed a verdict in favor of the plaintiff for the amount of the Kansas judgment, with interest.

To reverse the judgment entered upon this verdict a writ of error was brought. The principal question presented by the assignments of error was as to the character of the remedy provided by the Kansas statutes against a stockholder of an insolvent corporation; whether it was a special, peculiar and local remedy created by the statute and without force and not capable of being enforced outside of the limits of the State of Kansas.

SHIPMAN, *Circuit Judge:*

It will be observed, that the complaint contains the averments which are required either by section 32 or section 44, and seeks to enforce an alleged liability of the defendant, whether he is to be charged with the amount of the Kansas judgment or with the amount of the debt due to the plaintiff from the corporation, and it is to be further noticed that not only the fact of the judgment was proved, but that also all the facts upon which the judgment was based, such as the guaranty, the discount and the non-payment were proved, so that the question which is often raised as to the force and effect of the original judgment and how much it establishes against the stockholder is immaterial. The plaintiff has proved all the facts that are to be proved, whether the judgment conclusively established, against the stockholders, the indebtedness of the bank, or was only *prima facie* evidence of it, or was no evidence of the indebtedness, but was merely a condition precedent to a suit against the stockholder.

The main question in the case, whether a suit to enforce the liability declared by the constitution of Kansas and provided by its statutes, was transitory in its character and could be brought by an action at law in a court of another State against a single

stockholder who was a resident of such State, has already been stated.

87 It is to be premised, as was clearly shown by Justice Clifford, in *Morley vs. Thayer* (3 *Fed. Rep.*, 739), with respect to this particular constitutional provision, that it is not self-executing in its character, and that statutory legislation was therefore required to carry it into effect. *Grover vs. Slaughter* (15 *Pet.*, 449); *Wells vs. Robb* (43 *Kan.*, 201). It is also to be premised, as stated in *Pollard vs. Bailey* (20 *Wall.*, 520), and reaffirmed in *Fourth National Bank vs. Francklyn* (120 *U. S.*, 747), that the statutory remedy is exclusive. "A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action; but when the provision for a liability is coupled with a provision for a special remedy, that remedy and that alone, must be employed."

Two other decisions have been recently given by the Supreme Court, which do not undertake to construe this class of statutes, but which are important because they declare the conclusion which must naturally follow, if the plaintiff's construction has been established by the highest court of Kansas, and because they show the particulars in this class of statutes which the Supreme Court regards as especially significant upon the question of construction.

The case of *Flash vs. Conn* (109 *U. S.*, 371), was based upon a provision in a general act of the State of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified. The court after saying that great, if not conclusive, weight must be given to the construction which the highest court of New York had placed upon the statute, and that following such construction the liability was in contract, said that "it can be enforced by an action sounding in contract against a stockholder found in another State," and that a resort to equity was not necessary, but an action at law was adequate. Upon the last point the court said: "Lastly, it is objected that the dec-

88 laration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the case of *Pollard vs. Bailey* (20 *Wall.*, 520), *Terry vs. Tubman* (92 *U. S.*, 156), to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders. This, the court held, could only be done by a suit in equity.

But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execu-

tion thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can."

This decision was not novel in its character, although its doctrine had not been universally controlling in the State courts, but in *Huntington vs. Attrill* (146 *U. S.* 657) the Supreme Court stated its position in regard to the duty of a court of one State to enforce a statute of another State, which was penal in the popular sense, and a position which was not in accordance with the obiter remarks of the justice who delivered the opinion of the court in *Steam Engine Co. vs. Hubbard* (101 *U. S.*, 188, 192). The *Huntington case* grew out of a statute of the State of New York, which made the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock, liable for all its debts, and the question was whether such a statute was so penal in its character that it could not be enforced in the courts of another State. The court said "As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil
89 remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country."

It becomes, therefore, of prime importance to ascertain what the highest court of Kansas has said in regard to the transitory character of an action to enforce the statutory remedy, or what it has said upon the nature of the stockholder's obligation, and whether it was several or joint, definite, or adjustable according to a proportion. The germ of the present statutes of Kansas is found in the Territorial Laws of 1855. The entire body of statutes which were enacted at that session was afterwards repealed, and statutory provisions in regard to the individual liability of stockholders seem to have been passed with respect to particular classes of corporations, and not to have been reproduced in a condensed form, until the revision and codification of 1868.

The first judicial decision of Kansas in regard to the individual liability of stockholders was upon the proper construction of section 14, chapter 31, of the Laws of 1863, in regard to the incorporation of insurance companies, which was as follows: "The stockholders of any company organized under this act, shall to the amount of stock by them held, be jointly and severally liable for all debts or responsibilities of the company." The supreme court of Kansas in *Grand vs. Tucker* (5 *Kan.*, 70) held that "under this statute, a creditor may maintain an action at law against one or more stockholders in an insurance company organized under the act of 1863, to recover a debt due by the corporation." The court thus anticipated the decision in *Flash vs. Conn*, regarded "each stockholder as individually liable for the debts of the company to an amount equal to

the amount of his stock," rejected the idea of a proportionate
90 liability or a *pro rata* distribution of debts among stockholders, and consequently rejected the idea that the creditor's remedy must be in equity. In *Hentig vs. James* (22 *Kan.*, 326) the Kansas court, in discussing the mode of procedure under section 32, said that the creditor has two modes, either by the issuance of an execution against the stockholder, or by an action to charge him with the amount of the judgment against the corporation, but said nothing either in favor of or against the exclusive jurisdiction of the Kansas court over the second mode of procedure.

In *Howell vs. Mangelsdorf* (33 *Kan.*, 194) the question of the transitoriness of the action at law was closely touched. A creditor had obtained an unsatisfied Kansas judgment against a Kansas corporation, had given notice to a non-resident stockholder who was sought to be charged and had moved the court in which judgment was rendered, to order execution to issue against such non-resident. The question of the power of the trial court to grant such a motion came before the supreme court, which said that the first mode of procedure was not applicable to a non-resident stockholder, and that the second mode was "an ordinary action to be instituted wherever personal jurisdiction of the stockholder can be acquired," and further said that the ruling "does not deprive a creditor of a remedy against the stockholder residing in another State and upon whom service cannot be obtained here." "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation and an action to enforce the same is transitory," citing *Flash vs. Conn, supra.* It is true that this language is obiter in the sense that it was not absolutely necessary to the decision of the question before the court, which was, whether by notice to a non-resident, the Kansas court could order execution to issue against him; but it clearly stated the theory of the court respecting the nature of the statutory remedy and the way in which it is to be worked out, and in a certain sense was not obiter, because it answered the argument that the liability of non-resident stock-
91 holders must be enforced by notice and the levy of an execution, or was not enforceable, and that therefore in many instances the creditors were without remedy.

Inasmuch as the answer to the question in regard to the transitoriness of the action, is much aided by the fact that the remedy of the statute is several and individual and that the liability of the stockholder is a definite and fixed one, the next decision of the highest Kansas court in *Abbey vs. Dry Goods Co.* (44 *Kan.*, 415), is important. The case was under section 44 and the complaint joined several stockholders as defendants, against whom several judgments were recovered, the aggregate of which amounted to the debt of the creditor against the corporation. The court held that the liability of stockholders to creditors under this section was not joint, but that each must be sued separately. The statute was in substance a copy of the Missouri statute in regard to stockholders' liability, and the decision of the Missouri court of appeals upon the same subject, *Perry vs. Turner* (55 *Missouri*, 418), and the decisions in *Bank of*

Poughkeepsie vs. Ibbotson (24 *Wend.*, 473), and *Paine vs. Stewart* (33 *Conn.*, 516), upon analogous statutes, are to the same effect.

The drift and tendency of the Kansas decisions, other than the one in the *Howell case*, in regard to the character of the stockholders' liability and of the creditors' remedy under section 32 are manifest. The means which the statutes provided to enforce the individual constitutional liability, determined and fixed the extent of the amount which must be paid by each stockholder individually, and which in no manner depended upon what any other stockholder could or ought to pay. As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law and it is contractual because "every one who becomes a member of the company by subscribing to its stock, assumes this liability." (*Flash vs. Conn, supra.*) Section 32 has thus, by the decisions of the State court, the indicia of a transitory action, and although these indicia might be overcome by a manifest intent of the legislature
92 that the action should be local, yet when their intent has been interpreted by the highest court of their State, as in the *Howell case, supra*, we are not disposed to read into the statute another intent, unless such a construction is demanded. In our opinion another construction is not called for, but the legislature intended that the action against a non-resident stockholder was not necessarily to be under the jurisdiction of the courts of Kansas. Two modes of procedure were provided, one of a summary character which could be used in the case of resident stockholders, but which was useless against non-residents, and if no means had been provided to make the liability of non-resident stockholders effective, creditors might in many instances lose entirely the benefit of the constitutional provision for their protection. The second mode was therefore provided of a transitory character, and the amount of the liability was made definite and certain, so that each stockholder could be severally sued.

There is more color for the conclusion that the action under section 44 is local, because any stockholder who has paid a judgment against himself may sue the body of the stockholders and obtain contribution from them, and this part of the proceeding looks eventually towards a proportionate division among them. It does not necessarily follow that the original judgment must have been obtained in Kansas. However this may be, we are satisfied that the proceeding against a stockholder under section 32 is transitory.

It is said that this construction has not been sustained by the highest courts of the States of Massachusetts, Illinois and New York. It is true that, in *Bank of North America vs. Rindge* (154 *Mass.*, 203), which was a suit in Massachusetts to enforce the provisions of section 32 against a Massachusetts stockholder, the question of the construction of the statute was attempted to be raised, but, it is also true, that the attempt was not successful. The defendant demurred to the sufficiency of the cause of action as stated in the declaration, but the court was unable to decide whether the statute authorized an
93 action in another State, for the "declaration does not in terms set forth any statute of Kansas, nor show to what extent the

laws of Kansas above set forth, are statutory or rest in judicial decisions. We are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that State. But we must take the case as the parties present it to us." But in *Hancock Bank vs. Ellis* (166 *Mass.*, 414) the pleader was more careful and upon demurrer to a declaration upon the same statute against a Massachusetts stockholder, the court said, "A declaration which sets forth that according to the law of Kansas, the defendant stockholder of a corporation organized under the laws of that State is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere, is good," and further that "jurisdiction exists here (in Mass.) to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration." It thus appears that the courts of Massachusetts have not yet stated their own opinion upon the statute in question. In *Fowler vs. Lamson* (146 *Illinois*, 472) the plaintiff had recovered a judgment against a Kansas corporation before the superior court of Cook county, Illinois, an execution had been issued upon that judgment which was returned unsatisfied, and the plaintiff then brought a bill in equity in the courts of Cook county, against stockholders to recover the amount of the judgment.

This bill was dismissed upon the ground that the Kansas statute was local. In *Tuttle vs. National Bank of the Republic* (161 *Illinois*, 497) the question upon the Kansas statute came before the court, as it is presented here, and it was held that an action to carry this statute into effect would not lie in another State, three of the seven judges dissenting.

In *Marshall vs. Sherman* (148 *N. Y.*, 9) the question arose upon the defendant's demurrer to the sufficiency of the complaint and because all the necessary parties to the action were not in-
94 cluded. The constitution and statutes of Kansas were fully set out in the complaint, but the judge who spoke for the court remarked that there was no allegation as to the meaning or effect of the statutes or of the constitutional provision under the adjudication of the courts of Kansas, and that therefore the court was obliged to construe them by itself. Among the various suggestions which were given in favor of sustaining the demurrer, the court was of opinion that the statutes provide for a special and peculiar remedy under the laws of Kansas. The Kansas decisions were not referred to in the opinion.

It is well understood that the tendency of the decisions in the State courts has been to avoid taking jurisdiction of suits to enforce the liability of stockholders in a foreign corporation under the statutes of a foreign State, because, in the language of the court in the *Rindge case*, *supra*, the suit is one "which involves the relation between it (the foreign corporation) and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created." But when the statutory remedy is one which does not involve any relation between stockholder and corporation, but touches only the liability of the

stockholder to creditors (*Guerney vs. Moore* (131 *Missouri*, 650) the argument is simply one against the expediency of the statute.

The decisions in the Federal courts which affirm the jurisdiction of Federal courts in other States to enforce this particular statute of Kansas are *Bank of North America vs. Rindge* (57 *Fed. Rep.*, 279), *Rhodes vs. U. S. National Bank* (66 *Fed. Rep.*, 512), *McVicker vs. Jones* (70 *Fed. Rep.*, 754). Decisions, in addition to those already cited, in favor of jurisdiction of courts of foreign States to enforce similar or analogous State statutes, are *Paine vs. Stewart* (33 *Conn.*, 516), *Cuykendall vs. Miles* (10 *Fed. Rep.*, 342), *Auer vs. Lombard* (72 *Fed. Rep.*, 209).

The technical points which were made by the plaintiff in error are without solidity. It is said that the Kansas court did not acquire jurisdiction to render judgment against the corporation, because the cashier made a voluntary appearance and waived
95 the issuance of process at the commencement of the suit in 1895, when no business had been done by the bank after its insolvency on December 15, 1890. But an attorney-at-law appeared, filed an answer to which the plaintiff replied and the presumptions are in favor of the regularity of the judgment. It was for the defendant to show that it was collusive or that the attorney was an intruder. *Tenny vs. Townsend*, (9 *Blatchf.*, 274). It is next said that there was no competent evidence of the change of name of the corporation. The minutes of the proceedings were taken away with him by the president "when he left" in May or June 1889, and some secondary evidence was given of their contents, when perhaps an insufficient foundation had been laid for it. But the statutes of Kansas provide that a corporation can change its name, and section 12 of chapter 23 of the General Statutes of 1868, provides as follows: "Such change of name * * * shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the secretary of state an affidavit setting forth the name adopted, * * * together with the date at which such change was voted by the stockholders of such corporation." A properly authenticated copy of the original certificate filed in the office of the secretary of state was produced and was certainly sufficient proof of the change of name, until its truthfulness had been successfully attacked.

The judgment of the circuit court is affirmed, with costs.

William G. Wilson and *Joseph H. Choate*, for the plaintiff in error.

William B. Hornblower, for the defendant in error.

96 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss.*:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 95, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of George L. Whitman, plaintiff in error, against The Na-

tional Bank of Oxford, defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 14th day of October, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and twenty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

97 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is made within having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is annexed hereto, and under direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, November 3rd, 1897.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

98 U. S. Circuit Court of Appeals for the Second Circuit.

GEORGE L. WHITMAN, Plaintiff in Error,
against
NATIONAL BANK OF OXFORD, Defendant in Error.

It is hereby stipulated by and between the parties hereto that the certified transcript of the record of the proceedings in this court herein, which is now on file in the office of the clerk of the Supreme Court of the United States, shall be taken as a due and sufficient return to the writ of certiorari issued herein on October 26, 1897, out of said Supreme Court of the United States, directed to the judges of the United States circuit court of appeals for the second circuit, requiring the record and proceedings in this cause to be transmitted to the said Supreme Court for its action.

Dated New York, October 28th, A. D. 1897.

WILLIAM G. WILSON,
Counsel for Plaintiff in Error, Petitioner.
WM. B. HORNBLOWER,
HOWARD A. TAYLOR,
Counsel for Defendant in Error, Respondent.

A true copy.
WM. PARKIN, *Clerk.*

99 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which George L. Whitman is plaintiff in error and The National Bank of Oxford is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the southern district of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
100 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Case No. 16,695. Supreme Court of the United States. No. 182. October term, 1898. George L. Whitman *vs.* The National Bank of Oxford. Writ of certiorari and return. Office Supreme Court U. S. Filed Nov. 5, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,695 U. S. C. C. of appeals, 2nd circuit. Term No., 182. George L. Whitman, petitioner, *vs.* The National Bank of Oxford. Filed October 16, 1897.